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IN THE
Supreme Court of the United States
October Term, 1986

DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

Petitioner,

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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EDITOR'S NOTE:

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

1. Whether a union's assertion, not particularized, that a grievant "mistrusts" his union representative is legally sufficient sole reason for the union, at the very threshold of the grievance arbitration which it has brought against grievant's employer charging breach of the collective bargaining agreement by protracted layoffs of the shop steward grievant out of the contractual order of seniority, to rid itself of its statutory duty, under Labor-Management Relations Act, section 301(a), to give its grievant fair representation throughout the arbitration proceeding, when the reality was that the union maneuver was clearly a) punishment for grievant's exercise of free speech, protected by Landrum-Griffin's 29 U.S.C. §411(a)(2) in expressing his desire to have witnesses, himself included, called to establish the claimed contract violations and employer animus motivating them, b) plus, judging by the union's reaction to grievant's suggestion, a strongly felt union desire to suppress material evidence supportive of its case and thus "lose" the arbitration?

Far from consenting to the union's withdrawal of representation, petitioner had written to union counsel on August 3, 1984:

> "I am writing because I am very concerned about our recent conversations. For five long years I have requested that the union arbitrate my case. Now that the union has finally reached the point at which an arbitration can be conducted and it can be shown that I have been harrassed and intimidated by my employer, you informed me that if I try to testify at the arbitration you will not represent me. This leaves me after all of this time without representation and without the support of the union. You realize as well, I'm sure, that without the union's support and representa-

tion in the arbitration my chances of winning back in, lost wages, about $25,000, are not good. Moreover, when we spoke you informed me that you would not call any witnesses to prove that the employer has been harrassing me all of these years. If I am not permitted to testify and if, in addition, other workers are not subpoenaed to show that what I am saying is the truth, I cannot imagine how the union expects to win the arbitration in my case. ***

"*** it seems to me that for some reason you and the union are not willing to present my case in the strongest possible way and are instead willing to let my claims fail. If that should happen, I don't know what I can do. But it will be a cruel disappointment to me that after all of this time of being a shop steward and of paying all of the dues I have paid that my union did not support me. That is why I am writing this letter. I want you and the union to understand that I am demanding that you fight for me in this arbitration ***."

2. Whether an arbitrator—any arbitrator—exceeds his powers by, unilaterally and against grievant's will, depriving him of his statutory, strongly policied, right to representation by his union which had initiated the arbitration?

On August 20, 1984, before any evidentiary hearing in the arbitration, and with petitioner's letter of August 3rd at hand, the arbitrator made an interlocutory award on the union's motion and against petitioner's expressed wish, reading in pertinent part:

"The motion is granted. The Union and the firm of Sturm & Perl and its associates are removed as representatives of David Grynberg.

"Mr. Grynberg is directed forthwith to obtain other legal representation in this matter and to advise the American

> Arbitration Association that he has acquired such representation no later than thirty days from the date of this award so that process of this arbitration may continue expeditiously."

the foregoing notwithstanding the union had made the rhetorical ploy that

> "*** should the arbitrator deny the motion, nevertheless, the Union and its counsel believe that they adequately can represent Mr. Grynberg's interests without bias or malice and they are prepared properly and adequately to proceed with the case."

Nor did the arbitrator find it necessary to inquire why this union turned rogue should be so perturbed at the idea of proving its case.

3. Whether the District Court, as affirmed by the Court of Appeals, properly held that petitioner lacked standing as a "party" under the Federal Arbitration Act, 9 U.S.C. §§10 and 12 to seek judicial vacatur of the final arbitration award of November 9, 1985 denying petitioner any relief, on the ground that the union as a true party to the arbitration had not authorized him to maintain the vacatur proceeding, all this notwithstanding that union and arbitrator had severed and abandoned his union representation, forcing him to retain his own counsel, thereafter conducting and managing the arbitration on his own?

In this respect the District Court held:

> "Petitioner argues that the Union, by its actions during the arbitration proceeding, has given him the authority to act as its representative in appealing the arbitration award. In fact, the Union has specifically provided that Petitioner would not be representing the Union. ***

"For the above stated reasons, the court finds that petitioner has failed to state a cause of action and lacks standing to bring this suit."

4. Whether, in the light of the doctrine that substantial breach of a union's duty of fair representation, in grievance arbitration to remedy employer breach of a collective agreement, vacates the arbitration and leaves the grievant free, in his own right, to prosecute his breach of contract claim against the employer and/or his breach of duty claim against the union, in a judicial forum, the *obiter* of the Court of Appeals memorandum decision herein, quoting *Hines v. Anchor Motor Freight*, 424 U.S. 554, 568 (1976) which requires a grievant "to demonstrate that the union's breach of duty 'contributed to the erroneous outcome of the [arbitration] proceedings.' ***" is not out of context and repugnant to the concept of an enforceable right to fair representation *if* "erroneous outcome" is interpreted to mean a vacatable intrinsic infirmity in ordinarily unassailable arbitral findings, rather than a substantial procedural due process breach tainting an adverse award made under litigating circumstances where an award favorable to grievant would have been sustained?

5. Whether a union, designated by the Court of Appeals as a party plaintiff, served but not appearing in grievant's district court suit to vacate an arbitration award and for follow-up breach of contract relief against the employer, takes an active, direct role in the case, starting at the appellate level which is adverse to its grievant's cause and to its role as his continuing "representative," may not be held as an adverse party here, subject to adjudication and direction by this Court?

PARTIES

The caption of the case in this Court contains the names of all those designated as parties to the proceedings in the Court below.

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DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner prays that a writ of certiorari issue to review the order herein of the United States Court of Appeals for the Second Circuit of February 20, 1987 affirming the order of the United States District Court for the Southern District of New York, dated September 15, 1986, dismissing petitioner's petition to vacate an adverse award in an arbitration proceeding between respondent Local 1-J, Amalgamated Jewelry, Diamond & Watchcase Workers Union, S.E.I.U., AFL-CIO, and respondent Skalet, Inc. "for lack of subject matter jurisdiction on the grounds that petitioner [grievant in the arbitration proceeding] lacks standing to sue ***."

OPINIONS BELOW

The Memorandum Judgment of Affirmance of the Court of Appeals will not be published. A notation of the Court's action, without opinion, *sub nom. Local 1-J v. Skalet, Inc.*, is found at 814 F. 2d 653 (1987).

The opinion herein of the United States District Court for the Southern District of New York, per Honorable Constance Baker Motley, Chief Judge, dated September 15, 1986, has not to date been published. It is found in the District Court file of the case under case number 1986 Civil 427 (CBM).

The District Court order of dismissal of the petition to vacate the arbitration award herein, dated September 15, 1985 and filed September 16, 1985, states a jurisdictional reason for dismissal.

JURISDICTION

The judgment of affirmance of the Court of Appeals here sought to be reviewed is dated and filed February 20, 1987.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

REASONS FOR GRANTING THE WRIT

The Court of Appeals has decided important questions of federal law:

a) in a way which, to practical effect, tends to render unenforceable the statutory right of workers under Labor Management Relations Act, section 301(a), to

be accorded fair representation by their union representative in union instituted grievance arbitration against employers for breach of collective agreements claimed violative of grievants' personal rights thereunder;

b) in confirming the power of an arbitrator—any arbitrator—to deprive a grievant, unilaterally and against his expressed wishes, of his statutory, strongly policied, right to the fair representation services of his union representative by removing union and its counsel as grievant's representative in the proceeding and forcing grievant to obtain his own counsel; and

c) in denying to a grievant the standing of a "party" to seek vacatur of an adverse award under 9 U.S.C. §§10 and 12 because the union withholds consent even though the union, by withdrawing representation, has forced the grievant to conduct the arbitration as his own.

In doing so, the Court of Appeals has so far departed from the accepted and usual course of judicial proceedings, or so sanctioned such a departure by the district court, as to call for an exercise of this Court's power of supervision.

STATUTES WHICH THE CASE INVOLVES

Labor-Management Relations Act, §301(a); 29 U.S.C. §185(a):

"(a) Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having

jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

Labor-Management Reporting and Disclosure Act, §101(a)(2); 29 U.S.C. §411(a)(2):

(2) Freedom of speech and assembly

"Every member of any labor organization shall have the right to meet and assemble freely with other members; and to express any views, arguments, or opinions; and to express at meetings of the labor organization his views, upon candidates in an election of the labor organization or upon any business properly before the meeting, subject to the organization's established and reasonable rules pertaining to the conduct of meetings: *Provided*, That nothing herein shall be construed to impair the right of a labor organization to adopt and enforce reasonable rules as to the responsibility of every member toward the organization as an institution and to his refraining from conduct that would interfere with its performance of its legal or contractual obligations."

Federal Arbitration Act of 1925, as amended, 9 U.S.C. §§1 et seq.:

§5. *Appointment of arbitrators or umpire*

"If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been specifically named

therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator."

§6. Application heard as motion

"Any application to the court hereunder shall be made and heard in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

§10. Same; vacation; grounds; rehearing

"In either of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—

(a) Where the award was procured by corruption, fraud, or undue means.

(b) Where there was evident partiality or corruption in the arbitrators, or either of them.

(c) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.

(d) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(e) Where an Award is vacated and the time within which the agreement required the award to be made has not expired the court may, in its discretion, direct a rehearing by the arbitrators."

§12. Notice of motions to vacate or modify; service; stay of proceedings

"Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be

made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court. For the purposes of the motion any judge who might make an order to stay the proceedings in an action brought in the same court may make an order, to be served with the notice of motion, staying the proceedings of the adverse party to enforce the award."

STATEMENT OF THE CASE

This case has important bearing on the individual rights of millions of employees whose conditions of work and rights in and to their employment are covered by collective bargaining agreements featuring grievance arbitration. In an area where their contractual rights are collectively enforced exclusively by their bargaining representative in the first instance, the cornerstone of the residual rights left to the individuals is the due process guarantee, statutory under the Labor-Management Relations Act, §301(a) ("LMRA"), of an enforceable entitlement to fair representation in the arbitration brought by their union. The workings of that guarantee are authoritatively stated in *DelCostello v. United Brotherhood of Teamsters,* 462 U.S. 151 at 163-165 (1983):

> "It has long been established that an individual employee may bring suit against his employer for breach of a collective-bargaining agreement. *Smith v. Evenings News Ass'n.*, 371 U.S. 195 (1962) Ordinarily, however, *an employee is required to attempt to exhaust any grievance or arbitration remedies provided in the collective-bargaining agreement. Republic Steel Corp. v. Maddox,* 379 U.S. 650 (1965); cf. *Clayton v. Automobile Workers,* 451 U.S. 679 (1981) (exhaustion of intra-union remedies

not always required). Subject to very limited judicial review, he will be bound by the result according to the finality provisions of the agreement. See *W.R. Grace & Co. v. Rubber Workers*, 461 U.S. 757, at 764; *Steelworkers v. Enterprise Corp.*, 363 U.S. 593 (1960). In *Vaca* and *Hines*, however, we recognized that this rule works an unacceptable injustice when the union representing the employee in the grievance/arbitration procedure acts in such a discriminatory, dishonest, arbitrary, or perfunctory fashion as to breach its duty of fair representation. *In such an instance an employee may bring suit against both the employer and the union, notwithstanding the outcome or finality of the grievance or arbitration proceeding. Vaca v. Sipes*, 386 U.S. 171 (1967); *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976); *United Parcel Service, Inc. v. Mitchell*, 451 U.S. 56 (1981); *Bowen v. USPS*, 459 U.S. 512; *Czosek v. O'Mara*, 397 U.S. 25 (1970). Such a suit, as a formal matter, comprises two causes of action. The suit against the employer rests on §301 since the empoyee is alleging a breach of the collective-bargaining agreement. The suit against the union is one for breach of the union's duty of fair representation, which is implied under the scheme of the National Labor Relations Act.' 'Yet the two claims are inextricably interdependent. "To prevail against either the company or the Union, . . . [employee-plaintiffs] must not only show that their discharge was contrary to the contract but must also carry the burden of demonstrating breach of duty by the Union." ' *Mitchell, supra*, 451 U.S., at 66-67 (Stewart, J., concurring in judgment), quoting *Hines, supra*, 424 U.S. at 570-571. *The employee may, if he chooses, sue one defendant and not the other; but the case he must prove is the same whether he sues one, the other, or both.* ***" (emphasis supplied)

1. DelCostello and the Opinions Below

Even without further reference to the facts of this case, it is apparent that the opinions of the courts below

conflict with and defy the clearcut mandates of *DelCostello,* exhibit a pervasive hostility to the idea of a statutory mandate actually compelling a union, in an arbitration which it has instituted, to fairly represent the grievant in that proceeding, and would destroy enforceability of that mandate by turning the *duty* of fair representation into a union option upon the absurd theory that the grievant forfeits the statutory right when he exhibits what the union perceives to be anything less than a childlike "trust and faith" in his bargaining representative. And if *DelCostello,* like *Vaca v. Sipes,* 386 U.S. 171 (1967) and *Hines v. Anchor Motor Freight, Inc.,* 424 U.S. 554 (1976), condemns "perfunctory" representation, then total abnegation of representation before hearings have begun just because the grievant has expressed his desire to have witnesses called to support the grievance, is even more abrupt than perfunctory.

While *DelCostello* reiterates the necessity for a grievant, in seeking personal *judicial* remedies for vacatur and followup relief against employer and/or union, to attempt to exhaust arbitration, the district court opinion would require the grievant to abort the arbitration and pursue the union into the National Labor Relations Board within six months of the interlocutory arbitration award of August 20, 1984 which removed the union as representative, rather than working in the arbitration and waiting on the final award of November 9, 1985 which, until it issued, had the possibility of being a favorable award on the breach of contract claim against the employer. Thus the District Court opinion:

> "The court also takes note of the fact that petitioner failed to institute any action or complaint against the Union on the basis of unfair representation within the statutory time limits, such as filing of a complaint within six months from the occurrence of the alleged unfair labor

practice pursuant to section 10(b) of the National Labor Relations Act, 29 U.S.C. section 160(b), and failed to seek the vacation of the Arbitration Award which allowed the Union and its counsel to withdraw as petitioner's representative within 90 days of the filing or delivery of the award pursuant to 9 U.S.C. section 12."

DelCostello, of course, consistently with all prior authorities, looks to the right of grievants to fair representation as enforceable—in the event of union breach of that right—by private judicial suit on the part of the grievant seeking two step relief consisting of 1) vacatur of the tainted arbitration award, and 2) recovery against the employer for breach of contract and/or against the union for breach of its duty of fair representation. Shockingly, the opinions below undercut this indispensible right of remedial judicial recourse by making that grievant right dependent on the consent or authorization of the union charged with wrongdoing.

Thus, in fundamental and startling contradiction of *DelCostello's* restatement of the tenets of an enforceable doctrine of union duty of fair representation, the courts below have here held

a) that fair representation of grievants by unions is not an enforceable duty, but rather a union option leaving the union free to abandon its grievant if it professes that it lacks the grievant's trust and confidence;

b) that arbitrators are empowered to relieve unions of their duty to grievants of affording them fair representation, notwithstanding the statutory and strong public policy basis for burdening unions with the duty as the *quid pro quo* for the grant of initial exclusivity to the union representative in pressing the in-

dividual's contract grievances against his employer; and

c) that unions which have abandoned their grievants nevertheless retain an effective veto against any right of the grievant to seek remedial judicial recourse and, after vacatur, a fair trial of their contract claims.

The errors of the courts below in this case are both fundamental and at war with the rights of literally millions of workers. No matter how obscure the case and its "unimportance" as it seems to relate to a single individual, our notions of importance comprehend justice for all. But the obscurity is more apparent than real and so is its capacity, uncorrected, for mischief. The arbitration was conducted under the auspices of the American Arbitration Association, and the district court opinion is detailed. Unlike the Court of Appeals summary affirmance with its self-declared impotence to generate authority, the district court opinion, whether published in the Federal Supplement or not is a fully authoritative opinion buttressed by a court of appeals affirmance, and, should certiorari be denied, would then enjoy the *de facto* increment of certiorari denied. The case will then be circulated in the arbitration industry as it undoubtedly is now, and its capacity for mischief go on and on. By the same token, the millions who are affected plus the additional millions who believe in equal justice for all, would surely benefit from the authority of an opinion of this Court affirmatively spelling out the details of enforceability of grievants' rights to fair representation by their union representatives.

2. Basis for federal jurisdiction in the court of first instance

For the convenience of the Court a copy of the Joint Appendix in the court of appeals below has been submit-

ted with the filed copies of this petition. Paragraph 6 of the district court petition instituting this proceeding reads as follows (J.A., p. 10a):

> "6. Federal jurisdiction, both of the arbitration proceeding herein and of this application to vacate the arbitrator's award and direct a rehearing of the dispute before an impartial arbitrator appointed by the Court, is invoked under section 301 of the Labor-Management Relations Act of 1947, as amended; 29 U.S.C. §185, and the Federal Arbitration Act, 9 U.S.C. section 1 *et seq.*",

and the gravamen of the district court claim was depriving the petitioner of his statutory right "to fair representation in the proceeding by his exclusive bargaining agent ***."

Later in the district court proceeding, petitioner indicated to that court that the "rehearing" desired would be a judicial suit by Grynberg against the employer for breach of contract (J.A., p. 90a).

3. Facts and litigating events

Respondent Skalet, Inc. manufactures jewelry and is concededly in commerce. Since January 14, 1977 petitioner ("Grynberg") has been employed by Skalet as a jeweler, and, on March 6, 1978 one Jose Ruiz was hired by Skalet as a grinder. A jeweler solders, files and grinds jewelry pieces; a grinder files and grinds but does no soldering. Both crafts are in the jewelry department. Local 1-J ("Union") and Skalet have had a succession of collective agreements featuring identical layoff and recall provisions plus grievance arbitration as exclusive remedy:

> "ARTICLE XX
> SENIORITY
>
> 20.1—In the event that it shall become necessary for the Employer to lay off employees, it is agreed that the

principle of seniority shall be employed, namely; the last employee to be hired shall be the first to be laid off, and when rehiring resumes, the last employee to be laid off shall be the first to be rehired. In the application of the principle, it is understood that it shall be applied departmentally, that is, the length of service of the employee in the department."

"ARTICLE XXVIII
DISPUTES AND ARBITRATION

*****

28.2—This Agreement shall be the sole and exclusive basis for the determination of any and all complaints, disputes and grievances hereunder. The decision of the Arbitrator shall be binding and conclusive on both parties. The decision in no case shall be regarded as a precedent for a future case."

Since the end of May, 1979 Grynberg, who was also the shop steward, had endured protracted layoffs of many months duration, *all* out of seniority since his departmental junior Jose Ruiz was always retained on payroll while Grynberg was on layoff.

Finally, on March 12, 1984 the Union was induced to institute arbitration before the American Arbitration Association on Grynberg's behalf charging improper layoffs and seeking a make whole remedy (J.A., p. 22a).

In meetings between Union counsel and Grynberg, Grynberg expressed a desire to testify about the employer breach and personal animus and have witnesses called to corroborate his testimony; Union counsel threatened to withdraw from Grynberg's representation, and Grynberg dispatched his letter of August 3, 1984, set forth as Appendix 4 to this petition, to Union counsel which is earlier quoted herein in pertinent part, and in which he begged the Union not to abandon him.

Without further ado, the Union moved the arbitrator for its "removal" as Grynberg's representative and, on August 20, 1984, the arbitrator issued his Interlocutory Award (J.A., pp. 28a-30a) in which he stated:

> "At the start of the hearing a motion was made by Roger Madon, counsel for and in behalf of the Union and in behalf of the firm of Sturm & Perl, both to be removed as Grievant David Grynberg's representatives in this arbitration.
>
> "**** the statement makes clear that should the arbitrator deny the motion, nevertheless, the Union and its counsel believe that they adequately can represent Mr. Grynberg's interests without bias or malice and they are prepared properly and adequately to procede with the case.
>
> "Mr. Grynberg's response to the petition (elicited by the arbitrator) at the hearing *together with his letter of August 3, 1984*, to Mr. Madon unmistakeably confirm the latter's stated reason for making the motion; that the Union and its counsel do not have Mr. Grynberg's trust and faith adequately to represent him. ****
>
> "The motion is granted. The Union and the firm of Sturm & Perl and its associates are removed as representatives of David Grynberg.
>
> "Mr. Grynberg is directed forthwith to obtain other legal representation in this matter and to advise the American Arbitration Association that he has acquired such representation no later than thirty days from the date of this award, so that process in this arbitration may continue expeditiously." (emphasis supplied)

When Grynberg did retain counsel, the new counsel, on January 14, 1985 (J.A., p. 33a) wrote to the arbitrator, copies to counsel for union and employer, protesting the severance of union representation as illegal and prejudicial, and further characterizing the action as having been done to punish Grynberg for having exercised his Landrum-Griffin guaranteed rights of free speech.

Counsel urged the arbitrator to step down and make way for a court-appointed successor arbitrator:

> "*** I mean no aspersion on anybody's integrity, but in a situation where Grynberg's litigating situation and position have been unilaterally moved about, I think in all good grace and fairness you should step down from further service in the case, and the parties should stipulate for the appointment of a successor arbitrator under the Federal Arbitration Act, 9 U.S.C. §5, by a judge of the United States District Court for the Southern District of New York. Otherwise, should you step down, I would petition the Court myself."

The request was ignored and the arbitrator continued thereafter.

The arbitrator who had "removed" the Union and its counsel as Grynberg's representatives did not step down and he remained as arbitrator throughout the proceeding. Grynberg's layoffs out of the order of departmental seniority were conceded and tabulations showed that to mid-March 1985 over $30,000. in wages had been lost to Grynberg, exclusive of interest, retirement benefits and social security contributions (J.A., pp. 37a-40a). The layoff practices continuing thereafter have brought the lost wage item to over $50,000.

Nor did it turn out that Grynberg's desire to call witnesses to establish the Union's case, a desire whose expression had cost him his union representation at the very outset of the arbitration proceeding, was anything other than constructive and helpful to the arbitrating cause. For Grynberg produced an affidavit of one Derek Percy Pearl of May 9, 1985 (J.A., pp. 48a-50a). Pearl personally appeared at a subsequent arbitration session, testified and was cross-examined. He corroborated his affidavit which was then taken into the arbitration record as an exhibit.

The affidavit and testimony of Pearl, neither sponsored nor supported by the Union, was totally ignored by the Union and the arbitrator even though it showed full time jewelry department work by the junior employee Ruiz at all times whether Grynberg was or was not on layoff, and a personal hatred of Skalet's principal for the shop steward Grynberg.

On November 9, 1985 the arbitrator finally issued his award denying any relief whatsoever to Grynberg (J.A., pp. 23a-27a) notwithstanding the arbitrator's concession that:

> "Grynberg's grievance is that since May 30, 1979, the Employer has repeatedly layed him off while an employee (Juan Ruiz) with less seniority than he was kept on. Both Grynberg and Ruiz, respectively classified as "production jeweler" and "grinder", work in the jewelry department.
>
> "The Union's position is that Grynberg's layoffs were in violation of the contract's imperative to effect layoff by inverse order of seniority within the department since Ruiz unquestionably has less seniority than Grynberg in the jewelry department. As remedy for the contract violation, the Union seeks reimbursement retroactively on Grynberg's behalf, at his regular rate of pay, for each day of wrongful layoff suffered by him since May 30, 1979.
>
> "The Employer concedes that bargaining unit work, specifically "grinding" (which Grynberg can do) actually was performed by Ruiz during Grynberg's layoffs. ***"

Notwithstanding the contract's unambiguous, indeed rigid, mandate that layoff be accomplished in the inverse order of departmental seniority, the arbitrator felt that his own prescription for industrial justice overrode the contractual prescription. Thus, in the arbitrator's words:

"It seems to me that excessive zeal in applying seniority *** exposes the Employer to an unwarranted burden of choices ***

and

"In my opinion, the use of seniority *** overprotects the senior employee ***. The use of seniority *** is tantamount to abuse of the seniority provisions of the contract."

When, on November 29, 1985, Grynberg's counsel wrote to Union counsel requesting union cooperation and support in an application to vacate the award (J.A., pp. 52a-53a), Union counsel on December 2, 1985 replied avowing their disappointment with the award, their unwavering support of the contractual principle of seniority for whose vindication the arbitration had been brought, but nevertheless

"*** we reluctantly decline your invitation to join with you in your application, in behalf of Mr. Grynberg, to set aside the award in the above matter. ***

"One further note, you are to advise Mr. Grynberg that under no circumstances is he to indicate in your application that he represents the Union for any reason or upon any basis, in law or equity." (J.A., pp. 54a, 55a)

4. The proceedings in the district court

On January 13, 1986 suit under LMRA §301 and the Federal Arbitration Act was commenced in the United States District Court for the Southern District of New York by Grynberg to vacate the award of November 9, 1985 and, vacatur succeeding, for a rehearing *de novo* of Grynberg's contract claim against Skalet, Inc. (J.A., pp. 6a-55a). Both Union and Employer were served by mail with the Notice of Motion, Petition and Exhibits initiating the suit addressed to their respective attorneys as provided

by 9 U.S.C. §12 (J.A., p. 8a). The district court petition sought ultimate substantive relief only against Skalet and none against the union. Skalet appeared and, in lieu of an answer, moved for dismissal. The union however neither appeared in the lawsuit nor participated in the district court proceedings.

In the course of the district court proceedings Grynberg's initial perceptions of his remedial availabilities in judicial litigation, conditioned by his request in arbitration for a new arbitrator, contemplated an arbitral rehearing *de novo* as suggested by 9 U.S.C. §10(e), but these soon broadened with the awareness of the remedial advantages of a clean cut breach of contract action at law against his employer and the beneficent discipline of a parol evidence rule against the arbitration morass of binding tolerance to "errors" of fact and law. The upshot was that Grynberg, in his memorandum opposing Skalet's motion to dismiss, could say (J.A., p. 90a):

> "For all of the foregoing reasons, there being no material fact issues, we earnestly request the Court to vacate the arbitration award herein of November 9, 1985 and thereafter to follow up the vacatur by exercising one of the several options open to it, *viz.*: appointing an impartial arbitrator to conduct an arbitration de novo; *** or directing the matter for trial or summary judgment application at law as an ordinary contract lawsuit by Grynberg against Skalet under §301 of LMRA succeeding a vacated arbitration proceeding which was commenced on March 12, 1984. Our preference is for the latter."

After hearing, the district court issued its opinion and order (Appendices 2 and 3) dismissing Grynberg's cause for failure to state a claim and because of his asserted lack of standing, without authorization by the union, as a "party" to the arbitration, to maintain the suit.

As we have already urged, the opinion seems to clash at every meaningful point with the quoted restatement summary of *DelCostello v. United Brotherhood of Teamsters,* 462 U.S. 151 at 163-165 (1983). Thus *DelCostello's* stricture condemning "perfunctory" representation in an arbitration which a union has instituted is violated to even greater degree by sanctioning the total destruction of the right merely because the expression of a grievant's critical views violates some newly invented legal imperative that a grievant must have "trust and confidence" in his union to qualify for the right to fair representation; the fundamental statutory right to fair representation is turned into ordinary grist for the mill of unassailable arbitral powers; the admonition to grievant's to attempt to exhaust arbitration *before* resorting to judicial remediation equally activated both by breach of contract and breach of the union duty of fair representation, becomes, under the district court opinion, an impossibility since the grievant, if he is to avoid the bar of limitations, must immediately press unfair labor practice charges at the National Labor Relations Board and thus abort the arbitration; and, final insult to the dignity and standing of a grievant forced to conduct the arbitration as his own, denying such grievants the right to seek vacatur because the union has denied them authorization to do so. Thus does the district court opinion grievously impair the statutorily intended enforceability of a union's duty of fair representation of its grievants.

But the district court demands more than mere breach of a union's duty to fairly represent the grievant:

> "Even if the Union had breached its duty, the petitioner has failed to plead in his long and confusing petition or to establish that there is substantial reason to believe that the union's breach of its duty contributed to the allegedly erroneous outcome of the arbitration proceeding."

Thus for the district court, so gross a procedural flaw as the union's complete withdrawal of its representative sponsorship of the grievance with its inevitable signalling effect to the arbitrator of what the union really wants in the arbitration does nothing to make the adverse award an "erroneous outcome," even if it is so perceived by judicial standards. Therein lies the distortion of *Hines* v. *Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976) done by the district court in only partially paraphrasing *Hines*. For *Hines* makes clear that "erroneous outcome" is determined by judicial inquiry in the application to vacate the award, p. 558:

> "*** where the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the *focus* is no longer on the reasons for the union's failure to act but *on whether, contrary to the arbitrator's decision,* the employer breached the contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings. But the judicial remedy in *Humphrey* v. *Moore* [375 U.S. 335 (1964)] was sought after the adverse decision of the joint arbitration committee. Our conclusion in that case was not that decision was unreviewable. On the contrary, we proceeded on the basis that it was reviewable and vulnerable if tainted by breach of duty on the part of the union, even though the employer had not conspired with the union. ***" (emphasis supplied)

And for Grynberg to recover he must prove breach of contract, additionally and later to the breach of duty established on the vacatur application; but he should not be precluded from the opportunity to try the contract merits.

5. The proceedings in the Court of Appeals

It was at the Court of Appeals that the respondent union came to life, and notwithstanding that it was, is,

and continues to be Grynberg's collective bargaining representative, it dropped all pretensions of being anything but hostile to the person and arbitrating claims of Grynberg.

When Grynberg instituted his district court suit on January 13, 1986 by motion to vacate the arbitrator's award of November 9, 1985, he served the respective counsel for both the employer and the union with copies of the motion papers by ordinary mail pursuant to 9 U.S.C. §12 which says in pertinent part:

> "*** If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. ***"

The application itself sought relief only against the employer, i.e., vacatur of the award and rehearing *de novo* of the breach of contract claims against the employer. Nevertheless we deemed that the union as a party to the arbitration was entitled both to notice of the institution of suit and an opportunity to participate in the proceedings. The employer appeared and participated; the union did neither.

Not until the appeal was pending in the court of appeals did the union start a campaign of intervention in the appellate proceedings and its motivation was clearly to inflict harm on Grynberg's cause. For while the union was not targeted for damages or any other relief in the litigation, it came forward with the false claim that it had not been "served" with the motion papers and with the clear implication that Grynberg's "failure" to "serve" the union was a flaw fatal to his entire case. This badly motivated intervening activity by Grynberg's "represen-

tative" is shown by Appendix 8 to this petition and, in our opinion, shows fresh breaches of its continuing duty to fairly represent Grynberg and protect his interests. This malicious intermeddling, we feel, has earned for the union a place as a party respondent in this certiorari petition and to answer here for its activities. That it was served with originating papers is established by its inadvertent admission to the union's counsel as well as the docketed proof of service in the district court case (J.A., p. 8a). Thus during the pendency of the district court case, union counsel, on March 10, 1986, wrote to Grynberg's counsel:

> "We have been reviewing your papers which you have been serving on Skalet, Inc., the Respondent in the above action and which you have been forwarding to us by United States Mail (not to be confused with personal service). ***" (J.A., p. 94a)

To which Grynberg's counsel on March 11, 1986 replied:

> "It seems rather fatuous at this stage of the proceedings to set up some distinction between 'service' of papers and sending them by mail. Both Skalet, Inc. and Local 1-J were simultaneously served with the Notice of Motion and Petition instituting the federal Court proceedings on January 13, 1986 by mail addressed to the respective attorneys for Employer and Union in complete conformity with the requirements of 9 U.S.C. §12. Exercising their options, Skalet appeared and opposed, the Union elected not to appear and stood aloof. Since then we have furnished you with every litigating paper we have served on Skalet.
>
> "It follows that, with respect to the Union, David Grynberg, the Grievant-Petitioner herein, can in no way be held for a failure to timely serve process instituting this proceeding upon it."

Turning to the Court of Appeals memorandum of affirmance, aside from putting down Grynberg's effort to maintain a suit against Skalet for breach of contract by describing it as

> "*** Grynberg's action to vacate an arbitration award and to maintain a suit against his employer for unfair labor practices."

goes on to validate the action of the arbitrator and the union in severing union representation of Grynberg "because Grynberg's distrust of the union presented it from adequately representing him."

The *a priori* implication that a grievant's mistrust, in actuality an expression of protected free speech, is a forfeiting fault on the part of the grievant, to which is attributed the palpably phony effect of "preventing" the union from adequately representing him, effectively does away with the statutory right of workers to an enforceable duty of fair representation by their unions in grievance arbitrations. Coupled with the "erroneous outcome" requirement of *Hines v. Anchor Motor Freight, supra,* the erroneously rigid sense of arbitral unassailability erroneously intended for it by both courts below, and the practical effect would be stultification of the union duty and grievant entitlement to fair representation.

We feel that only in the citation by the court of appeals of *United Parcel Service v. Mitchell,* 451 U.S. 56 (1981) is the court of appeals correct.

ARGUMENT

We refer to our quotation from *DelCostello v. United Brotherhood of Teamsters,* 462 U.S. 151 (1983) made earlier in this petition because, in its authoritative and comprehensive way, it furnished legal predicates to the facts and events of the case as they unfolded.

What emerges from *DelCostello* is its positive affirmance that the statutory scheme of a duty on the part of unions and a corresponding entitlement on the part of grievants to furnish and receive fair representation is a matter of high public policy to be vigorously sustained and enforced. Greater than its importance to individuals, it is a concept of tremendous societal value informing millions of our people that they are valued, have dignity and standing, and enjoy enforceable rights.

The sad impact of the case below is its pervasive hostility to the concept of a duty of fair representation, and with that goes a reduction of the status of working people to mere ciphers with illusory "rights" who had better manage to stay in the good graces of those set over them.

Statistically our decisional literature on the subject is dominated by technical questions—limitations are a good example—where claimants usually come to grief.

The handling of this case in the courts below was pervasively wrong and destructive of the residual individual rights of workers. It is time for another decision from this Court dealing affirmatively with the rights of grievants and, hopefully, vindicating them.

CONCLUSION

For the foregoing reasons, petitioner earnestly prays for the grant of a writ of certiorari herein.

May 19, 1987.

Respectfully submitted,

MILTON HOROWITZ
Attorney for Petitioner
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(212) 267-0606

APPENDIX 1—COURT OF APPEALS MEMORANDUM ORDER OF AFFIRMANCE OF DISTRICT COURT ORDER OF DISMISSAL, FILED FEB. 20, 1987

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twentieth day of February, one thousand nine hundred and eighty-seven.

Present: HONORABLE JAMES L. OAKES,
HONORABLE THOMAS J. MESKILL,
HONORABLE J. DANIEL MAHONEY,
Circuit Judges.

In the Matter of the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY & WATCHCASE WORKERS UNION, S.E.I.U., by DAVID GRYNBERG, Grievant, as delegated Proponent of the Grievance,

Plaintiffs,

DAVID GRYNBERG, Grievant, as delegated Proponent of the Grievance,

Plaintiff-Appellant,

vs.

SKALET, INC., Employer,

Defendant-Appellee.

Docket No. 86-7869

This is an appeal from an order of the United States District Court for the Southern District of New York, Motley, *C.J.*, entered September 15, 1986, dismissing for

lack of standing Grynberg's action to vacate an arbitration award and to maintain a suit against his employer for unfair labor practices.

This cause came on to be heard on the transcript of record from said district court and was argued by counsel.

The order of the district court is AFFIRMED.

Grynberg was required to establish two preconditions in order to maintain this suit. First, he had to establish that the union breached its duty of fair representation. *United Parcel Service v. Mitchell,* 451 U.S. 56, 66-67 (1981) (Stewart, *J.*, concurring); *Hines v. Anchor Motor Freight,* 424 U.S. 554, 568 (1976). Second, he was required to demonstrate that the union's breach of duty "contributed to the erroneous outcome of the [arbitration] proceedings." *Hines,* 424 U.S. at 568.

The arbitrator permitted the union to withdraw from Grynberg's representation because Grynberg's distrust of the union prevented it from adequately representing him. Thereafter, the union assisted Grynberg's new counsel throughout the arbitration. Grynberg fails to allege any other possible union misconduct. There was no showing that the union breached its duty of fair representation. Grynberg thus failed to establish the first precondition to standing and dismissal of his complaint was proper.

s/ James L. Oakes
James L. Oakes, U.S.C.J.

s/ Thomas J. Meskill
Thomas J. Meskill, U.S.C.J.

s/ J. Daniel Mahoney
J. Daniel Mahoney, U.S.C.J.

N.B. Since this statement does not constitute a formal opinion of this court and is not uniformly available to all parties, it shall not be reported, cited or otherwise used in unrelated cases before this or any other court.

APPENDIX 2—DISTRICT COURT ORDER OF DISMISSAL DATED SEPTEMBER 15, 1986, FILED SEPTEMBER 16, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration
between
LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, by DAVID GRYNBERG, Grievant, as delegated Proponent of the Grievance,

Petitioner,

and

SKALET, INC., Employer,

Respondent.

---

86 Civ. 427 (CBM)

ORDER

In accordance with the opinion filed simultaneously herewith, respondent's motion to dismiss for lack of subject matter jurisdiction on the grounds that petitioner lacks standing to sue is granted. Accordingly, this suit is dismissed in its entirety.

SO ORDERED.

Dated: New York, New York
September 15, 1986

s/ Constance Baker Motley
Constance Baker Motley
Chief Judge

APPENDIX 3—DISTRICT COURT OPINION, SEPTEMBER 15, 1986

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In the Matter of the Arbitration
between
LOCAL 1-J AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, by DAVID GRYNBERG, Grievant, as delegated Proponent of the Grievance,

Petitioner,

and

SKALET, INC., Employer,

Respondent.

---

86 Civ. 427 (CBM)

APPEARANCES:
MILTON HOROWITZ, ESQ.
15 Park Row
New York, New York 10038
Attorney for Petitioner

GLAUBERMAN & KESSLER, ESQS.
By: Robert L. Rotmil
475 Fifth Avenue
New York, New York 10007
Attorneys for Respondent

OPINION

Petitioner. David Grynberg, has filed this petition seeking an order vacating an arbitration award pursuant to 9 U.S.C. section 10 and directing a rehearing of the arbitration, de novo, before an arbitrator to be appointed by the court pursuant to 9 U.S.C. section 5. Petitioner has moved to vacate the arbitratioin award. Respondent has not yet answered that motion but, instead, has moved to dismiss the petition on the grounds that this court lacks subject matter jurisdiction since Grynberg lacks standing to institute this proceeding; that petitioner has failed to join an indispensible party under Rule 19 of the Federal Rules of Civil Procedure; and that petitioner has failed to state a claim upon which relief can be granted. Respondent's motion to dismiss the complaint is granted.

FACTS

The following recitation of facts is based upon the facts set forth in plaintiff's complaint and exhibits attached to and incorporated by reference by petitioner to that pleading.

Respondent Skalet, Inc. ["Skalet"], is a jewelry manufacturer and a member of the Jewelry Manufactures Association, Inc. ["Association"]. The Association, on behalf of its members, has entered into a collective bargaining agreement ["agreement"] with the Amalgamated Jewelry, Diamond and Watchcase Workers' Union S.E.I.U.-AFL-CIO Local No. 1-J ["Union"]. The agreement contains provisions for the exclusive resolution of disputes and grievances between the Union on behalf of its members and the Association on behalf of its members by arbitration. Paragraph 28 of the agreement provides:

28.1 - All complaints, disputes or grievances arising between the Association and the Union and/or between members of the Union and members of the Association, involving questions of interpretation or application of any of the provisions of this Agreement or any acts, conduct or relations between the parties and their respective members, directly or indirectly, shall be adjusted as follows:

(a) The Employer and the Shop Steward shall in the first instance attempt to adjust said complaint, dispute or grievance.

(b) Should they be unable to adjust or otherwise finally dispose of the complaint, dispute or grievance, the Union office shall be promptly notified and a meeting between the Employer, the Shop Steward and a Union representative shall be held not more than three (3) working days later.

(c) Should such meeting not result in a mutually satisfactory disposition of the complaint, dispute or grievance, it shall be submitted to representatives of the Association and the Union for disposition.

(d) Should such meeting not result in a mutually satisfactory disposition of the complaint, dispute or grievance, it may be submitted to arbitration by either party before an arbitrator designated by the American Arbitration Association in accordance with its rules.

(e) The party electing to submit the complaint, dispute or grievance to arbitration shall serve notice thereof in writing to the other party by certified mail and shall mail a copy of the notice to the Association or the Union as the case may be.

(f) The interested parties in any complaint, dispute or grievance shall appear on due notice in person before the Arbitrator, and give testimony. In the event of default by either party in appearing before the Arbitrator, the Arbitrator is hereby specifically authorized and empowered to render a decision upon the testimony of the party appearing, which shall be binding and conclusive on both parties.

(g) The Arbitrator's fee, if any, shall be borne equally by the parties.

28.2 - This Agreement shall be the sole and exclusive basis for the determination of any and all complaints, disputes or grievances hereunder. The decision of the Arbitrator shall be binding and conclusive on both parties. The decision in no case shall be regarded as a precedent for a future case.

The collective bargaining agreement also provides that if a manufacturer needs to lay off workers, those who were hired last would be laid off first.

Petitioner is a member of the union and had been employed by respondent Skalet since January 11, 1977. Petitioner, during the times he worked at respondent's place of business was shop steward for the union. Petitioner had been laid off from his position as a repair jeweler several times since May, 1979. Petitioner contends that an employee with lesser seniority had been kept on in violation of the collective bargaining agreement.

On March 12, 1984, the Union filed a Demand for Arbitration alleging that the grievant was improperly laid off in contravention of the seniority provisions of the agreement. Subequently a dispute arose between Grynberg and the Union over how their case before the arbitrator should be handled. Grynberg apparently wished to testify

and to call witnesses to testify at the proceeding concerning harassment and intimidation by his employer. According to Grynberg, his employer, by laying him off, was seeking to deprive him of his first amendment rights. The Union did not want to call the witnesses.

On August 7, 1984, the Union and its counsel requested that the Arbitrator grant them permission to withdraw as Grynberg's representatives in the arbitration. The Union also stated that if the motion were denied, it would continue to represent Grynberg. Grynberg, who opposed the motion, was given the opportunity to respond to the request by the Arbitrator. After considering Grynberg's response and a letter he had written to the Union, the arbitrator found that "the Union and its counsel do not have Mr. Grynberg's trust and faith adequately to represent him." The arbitrator noted further:

> The Union and its counsel . . . are put to the task of performing their functions under the stressful cloud of Mr. Grynberg's expressed lack of confidence in them, a situation that invites repetition and escalation of Mr. Grynberg's complaint and subjects the Union and counsel to untenable compromise should they fail in their efforts to represent him.

The motion of the Union was granted. Grynberg was directed to obtain other legal representation. The Union and its counsel were directed to supply data, documentation and administrative assistance upon request to Grynberg and his attorney. Grynberg did obtain other counsel and the Union cooperated with his counsel throughout the proceeding. In fact, the Union's counsel continued to attend the hearings held in this matter.

During the course of the arbitration, Grynberg complained about the manner in which the arbitrator was selected, about frequent adjournments of the proceeding,

and the arbitrator's granting of the union's motion to be relieved from its obligation to represent Grynberg. Three hearings were held on January 23, 1985, March 15, 1985, and August 27, 1985.

On November 9, 1985, the arbitrator's award was rendered, denying the grievance. The arbitrator found that Grynberg had not been laid off in violation of the collective bargaining agreement. By letter dated November 29, 1985, Grynerg's counsel requested that the Union join in his application to set aside the arbitrator's award. The Union, while indicating that it disagreed with the arbitrator's decision, declined to do so because of the provision of in the collectieve bargaining agreement that the decision of the arbitrator is binding and final. In addition, the Union indicated that under no circumstances was Grynberg to indicate in his application that he represents the Union.

Grynberg has commenced this proceeding in the Union's name, seeking to vacate the Arbitrator's Award pursuant to 9 U.S.C. section 10, alleging that the arbitrator exceeded his powers in the award made on August 20, 1984, which allowed the Union and its counsel to withdraw. Grynberg has neither filed an unfair labor practice against the Union nor has he instituted suit against the Union for any claimed breach of its duty of fair representation.

DISCUSSION

STANDING AND FAILURE TO STATE A CAUSE OF ACTION

Grynberg ["petitioner"] relies on section 301 of the Labor Management Relations Act of 1947, as amended (29 U.S.C. section 185(a) as the basis for federal jurisdiction in his petition to vacate the arbitration award. The

right of an employee, however, to bring suit under section 301 is limited where there is a collective bargaining agreement in existence between an employee's Union and his employer which contains the sole and exclusive procedures for the settlement of disputes through arbitration. *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 566-67 (1978); *Vaca v. Sipes*, 386 U.S. 171, 186 (1964). Such a collective bargaining agreement exists in this case. Accordingly, petitioner, as a condition precedent to the institution of this suit, must allege and demonstrate that the Union breached its duty of fair representation to the employee.

United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 66-67 (1981). "[A] plaintiff must prevail upon his unfair representation claim before he may even litigate the merits of his section 301 claim against the employer." *Id.* at 67. In addition, where as here, the union utilized the grievance process, the court must also consider "whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings." *Hines v. Anchor Motor Freight, Inc.*, supra, 424 U.S. at 568.

While petitioner has asserted that the Union breached its duty of fair representation, the facts set forth in the petition indicate that the Union did not breach such duty. A breach of the duty of fair representation occurs when a union's conduct toward a member is arbitrary, discriminatory or in bad faith. *Vaca v. Sipes, supra.* Petitioner has not shown that the union's conduct met this standard. The Union was relieved of its obligations to represent petitioner during the arbitration proceeding only after making a motion. In requesting to be relieved, the Union also indicated that it would continue representing ptitioner if the arbitrator determined that was the appropriate route. Additionally, petitioner was given the opportunity to present his views on the matter and later to

obtain other counsel to assist him. It is also a significant factor that the Union continually cooperated with petitioner and his counsel during the remaining hearings before the arbitrator. Finally, the fact that the Union refused to appeal the arbitration award was not a breach of its duty of fair representation. *Lofton v. United States Postal Service,* 596 F.Supp. 36 (S.D.N.Y. 1984).

Even if the Union had breached its duty, the petitioner has failed to plead in his long and confusing petition or to establish that there is substantial reason to believe that the union's breach of its duty contributed to the allegedly erroneous outcome of the arbitration proceeding. As mentioned above, it is undisputed that the Union and its counsel cooperated with petitioner and his counsel throughout the arbitration process and attended all of the hearings. In fact, petitioner's counsel, after the proceedings were completed, thanked the Union for its assistance. While petitioner argues in his opposition papers that his counsel lacked the expertise the Union could provide, he does not indicate what expertise that was or how that expertise would result in a different decision. In addition, it appears the Union did provide petitioner and his counsel with the benefit of its expertise. Finally, it is apparent that petitioner was given the opportunity to argue his case before the arbitrator and that the Union's withdrawal as his formal representative did not inhibit his ability to present evidence or have witnesses testify. Therefore, it appears that petitioner lacks standing to bring this action and that petitioner has failed to state a cause of action.

The court also takes note of the fact that petitioner failed to institute any action or complaint against the Union on the basis of unfair representation within the statutory time limits, such as the filing of a complaint within six months from the occurrence of the alleged unfair labor practice pursuant to section 10(b) of the Na-

tional Labor Relations Act, 29 U.S.C. section 160(b), and failed to seek the vacation of the Arbitration Award which allowed the Union and its counsel to withdraw as petitioner's representative within 90 days of the filing or delivery of the award pursuant to 9 U.S.C. section 12.

Petitioner argues that the Union, by its actions during the arbitration proceeding, has given him the authority to act as its representative in appealing the arbitration award. In fact, the Union has specifically provided that petitioner would not be representing the Union. In addition, the Union advised petitioner that it would not seek an appeal because, pursuant to the terms of the collective bargaining agreement, the decision of the arbitrator was final and binding on the parties, and to appeal would constitute a breach of the arbitration agreement.

For the above stated reasons, this court finds that petitioner has failed to state a cause of action and lacks standing to bring this suit.

Dated: New York, New York
September 15, 1986

CONSTANCE BAKER MOTLEY
Chief Judge

APPENDIX 4 - LETTER OF DAVID GRYNBERG TO COUNSEL FOR LOCAL 1-J, AUGUST 3, 1984

David Grynberg
12 Paerdegat 5th Street
Brooklyn, N.Y. 11236
August 3, 1984

Dear Mr. Roger Madon,

I am writing because I am very concerned about our recent conversations. For five long years I have requested that the union arbitrate my case. Now that the union has finally reached the point at which an arbitration can be conducted and it can be shown that I have been harrassed and intimidated by my employer, and informed me that if I try to testify at the arbitration you will not represent me. This leaves me after all of this time without representation and without the support of the union. You realize as well, I'm sure, that without the union's support and representation in the arbitration my chances of winning back in, lost wages, about $25,000, are not good, Moreover, when we spoke you informed me that you would not call any witnesses to prove that the employer has been harrassing me all of these years. If I am not permitted to testify and if, in addition, other workers are not subpoenaed to show that what I am saying is the truth, I cannot imagine how the union expects to win the arbitration in my case.

I do not want there to be a misunderstanding of what I am saying. For years I have asked the union to take my situation to the National Labor Relations Board and to fill a charge against my employer. The union has repeatedly refused to take the case and instead has told me I shold go as an individual. But by the time I was told I could go to the Board without the union, the time for making a complaint had run out. For years I have asked the union to

grieve my situation, to take my case to arbitration. The union repeatedly refused to take the case but finally, after all of this time, I am being given an arbitration. However, it seems to me that for some reason you and the union are not willing to present my case in the strongest possible way and are instead willing to let my claims fail. If that should happen, I don't know what I can do. But it will be a cruel disappointment to me that after all of the dues I have paid that my union did not support me. That is why I am writing this letter. I want you and the union to understand that I am demanding that you fight for me in this arbitration, and that you protect me and my job and my lost wages from a sham arbitration.

Sincerely,

s/ Mr. David Grynberg
Mr. David Grynberg

APPENDIX 5—INTERLOCUTORY ARBITRATION AWARD OF AUGUST 20, 1984 REMOVING UNION AND ITS COUNSEL AS GRIEVANT'S REPRESENTATIVES AND DIRECTING GRIEVANT TO SECURE HIS OWN COUNSEL

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
between

Skalet, Inc.
and
Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union SEIU, AFL/CIO

AWARD ON MOTION

CASE No. 1330 0373 84

Re: Layoffs of David Grynberg

Appearances:

For the Employer:
Martin Ellenberg, Esq.
Ira Skalet, Pres.

For the Union:
Sturm & Perl, Esqs.
by Roger H. Madon, Esq.
Oswald Gutierrez, V. Pres.
David Grynberg, Grievant

Mario A. Procopio
Arbitrator

The Employer and the Union are parties to a collective bargaining agreement which provides for the arbitration of unresolved disputes that may arise during the term of the agreement. On August 7, 1984, the undersigned, duly having been designated to arbitrate this matter pursuant to the procedures of the American Arbitration Association, held a hearing at the offices of the Association, 140 West 51st Street, New York, New York.

At the start of the hearing a motion was made by Roger Madon, counsel for and in behalf of the Union and in behalf of the firm of Sturm & Perl, both to be removed as Grievant David Grynberg's representatives in this arbitration.

The statement of Mr. Madon in support of the motion sets forth several circumstances and discussions wherein Mr. Grynberg and on one occasion, Mrs. Grynberg, expressed their belief to the Union and to Mr. Madon that the Union, Mr. Madon and the firm of Sturm & Perl can not adequately represent the interests of Mr. Grynberg in this matter. The statement makes clear that should the arbitrator deny the motion, nevertheless, the Union and its counsel believe that they adequately can represent Mr. Grynberg's interests without bias or malice and they are prepared properly and adequately to procede with the case.

Mr. Grynberg's response to the petition (elicited by the arbitrator) at the hearing together with his letter of August 3, 1984, to Mr. Madon unmistakeably confirm the later's stated reason for making the motion: that the Union and its counsel do not have Mr. Grynberg's trust and faith adequately to represent him. The Union and its consel therefore are put to the task of performing their functions under the stressful cloud of Mr. Grynberg's expressed lack of confidence in them, a situation that invites repetition and escalation of Mr. Grynberg's complaint and subjects the Union and counsel to untenable compromise

should they fail in their efforts to represent him. In view of this state of affairs, I am of the opinion that the Union and counsel should be relieved from active participation in this arbitration proceeding and that Mr. Grynberg should have the opportunity to seek other legal representation o his liking and trust in pursuit of this matter.

For the reasons hereinabove set forth and upon all of the creditable and substantial and testimony presented, I make the following:

AWARD

The motion is granted, the Union and the firm of Sturm & Perl and its associates are removed as representatives of David Grynberg.

Mr. Grynberg is directed forthwith to obtain other legal representation in this matter and to advise the American Arbitration Association that he has acquired such representation no later than thirty days from the date of this award, so that process of this arbitration may continue expeditiously.

The Union and its counsel are directed to supply data, documentation and administrative assistance, etc., relative only to the subject matter and process of this arbitration, to Mr. Grynberg's designated legal representative upon request.

Dated: Ausust 20, 1984.

S/Mario A. Procopio
Mario A. Procopio, Arbitrator

AFFIRMATION

STATE OF NEW YORK)
)SS.:
COUNTY OF NASSAU)

On this 20th day of August, 1984, I hereby affirm, pursuant to Section 7507 of the Civil Practice Law and Rules, that the foregoing is my Award in the above captioned matter.

S/Mario A. Procopio
Mario A. Procopio, Arbitrator

APPENDIX 6 - AFFIDAVIT OF DEREK PERCY PEARL, MAY 9, 1985

American Arbitration Association

In the Matter of the Arbitration between
Local 1-J, Amalgamated Jewelry, Diamond & Watchcase Workers Union, S.E.I.U., AFL-CIO,

-and-

Skalet, Inc.

Re: Layoffs of David Grynberg

No. 1330 0373 84

STATE OF NEW YORK)
COUNTY OF NEW YORK) ss.:

DEREK PERCY PEARL, residing at 1784 East 15th Street, Brooklyn, New York 11229, deposes and says:

I make this affidavit at the request of the above named David Grynberg and his counsel Milton Horowitz.

I am 47 years old, have had many years of experience in the jewelry manufacturing industry, and am a skilled craftsman therein. In September 1981 I was employed by Skalet, Inc. as a diamond and gemstone setter, one of the highest paid crafts in the shop. I worked there steadily until mid-August 1984 when I was laid off. That severance was not acrimonious, was for economic reasons, and, on October 8, 1984, I was hired as a setter by Mastro Jewelers, Inc. of 64 West 48th Street, New York, New York and have worked there eversince.

My three years of employment by Skalet, Inc. from September 1981 to August 1984 was steady and unbroken. My work took me frequently into Skalet's Jewelry Department area, going there on average between 8 and ten times

every working day. I knew both David Grynberg and Jose Ruiz very well and was thoroughly familiar with their work. Both Grynberg and Ruiz worked in the same department and in the same jewelry department area. Grynberg was a full line production jeweler in the Jewelry Department performing all three of the main line functions of the jeweler's craft, vis., soldering, filing, and grinding of pieces of jewelry. Ruiz did no soldering, but worked full time at grinding and filing.

During my three years at Skalet, although he was frequently on layoff and consequently absent from the shop for long spells, Grynberg was the shop steward. In that same period of time, Ruiz, although junior in seniority to Grynberg, was never laid off during shop operations notwithstanding he was in the same department as Grynberg.

At *all* times, regardless of whether Grynberg was or was not on layoff, the overwhelmingly great bulk of Ruiz' work during the regular working hours were devoted to performing the regular jewelry department tasks of grinding and filing of pieces of jewelry in the process of fabrication. In contrast to his unrelentingly hostile demeanor to Grynberg, the relationship between Ira Skalet, the employer's principal, and Ruiz was particularly friendly. A smiling, cheerful Ruiz would accommodate the boss by running errands, delivering packages, sweeping the area floor and the like. He also did routine maintenance and minor repairs of machinery - but this latter would be done outside of the regular working hours when the machines were down. However, all of this was casual and merely incidental to the journeyman operations of grinding and filing jewelry which Ruiz performed every working day during the regular working hours. Never more than a distinctly minor fraction of Ruiz' working time, these casual chores were squeezed out to the vanishing point when Grynberg was on layoff and Ruiz had to shoulder the burden of work that ordinarily would have

been performed by Grynberg. Any notion that Ruiz performed chores outside the coverage of the collective agreement in anything approaching a meaningfull portion of his working time is an utter fiction.

I cannot close without attesting how denigrating and unrelentingly cruel was Skalet's behavior to Grynberg. When Grynberg was on the job, Skalet would upbraid him, yell at him, abuse him. Characteristically Grynberg, avoiding eye contact, would look down and to a side, all the time remaining silent.

When Grynberg was out on layoff, Skalet would still constantly disparage Grynberg, declaring how much he wanted to drive Grynberg out of the shop and be rid of him for good. This sentiment he expressed to everyone in the shop, usually accompanied by Skalet's favorite charade of asking practically everyone whether that person would not want to be shop steward in Grynberg's place.

I intend to back up what I say here by appearing and testifying to the same effect at the next arbitration session which I understand has now been put off from May 23, 1985 to June 18, 1985. There I will testify and be subject to cross examination.

Sworn to before me this
9th day of May, 1985.

S/Derek Percy Pearl
Derek Percy Pearl

S Milton Horowitz
Milton Horowitz
Notary Public, State of New York
No. 24-6267550
Qualified in Kings County
Expires March 30, 1986

APPENDIX 7 - FINAL OPINION AND AWARD OF ARBITRATOR, NOVEMBER 9, 1985

AMERICAN ARBITRATION ASSOCIATION

In the Matter of the Arbitration
between

Skalet, Inc.
and
Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union SEIU, AFL/CIO

OPINION and AWARD
CASE No. 1330 0373 84
Re: Layoff, Seniority, David Grynberg.

Appearances:

For the Employer:
Martin Ellenberg, Esq.
Ira Skalet, Pres.

For the Union:
Sturm & Perl, Esqs.
by Roger H. Madon, Esq.
Oswald Gutierrez, V. Pres.
David Grynberg, Grievant

Mario A. Procopio
Arbitrator

The Union and the Employer are parties to a collective bargaining agreement which provides for the arbitration of unresolved disputes that may arise during the term of the agreement. On August 7, 1984, January 23, March 15, and August 27, 1985, the undersigned, duly having been designated to arbitrate this matter pursuant to the procedures of the American Arbitration Association, held days of hearing, the hearing of August 27, 1985, at the law offices of Dinkes, Mandel, Dinkes & Morelli, 112 Madison Avenue, New York, New York, the three previous hearings at the offices of the Association, 140 West 51st Street, New York, New York.

In framing the issue at the January 23, 1985 hearing, the parties concurred on the subject matter of the issue, but they disagreed respecting the period involved. The parties moved that the arbitrator frame the issue.

Accordingly, the issue before me is as follows:

> Did the Employer layoff David Grynberg out of seniority in violation of the contract?
>
> If so, what shall be the remedy and how shall it apply in respect to time?

Skalet, Inc. is engaged in the manufacture of Jewelry, starting with raw materials and ending with the finished product. Ira Skalet, president of the corporation, superintends the entire operation, assisted by a general foreman. At one time, the Employer employed 75 bargaining unit people, since 1978, business has leveled down so that at present approximately 28 bargaining unit employees make up the work force.

David Grynberg first was employed on January 11, 1977, as a repair jeweler, repairing house defects before shipment. From time to time he has been called upon to do other jeweler functions, but in the main, his duties were and continue to be jewelry repairing. For all the time here

under discussion Grynberg has served as the Union shop steward.

The contract provides for departmental seniority by which layoffs are required to be given in inverse order of departmental seniority regardless of classification within the department. There are eight departments listed in the contract each of which has several classifications.

Grynberg's grievance is that since May 30, 1979, the Employer has repeatedly layed him off while an employee (Juan Ruiz) with less seniority than he was kept on. Both Grynberg and Riz, respectively classified as "production jeweler" and "grinder", work in the jewelry department.

The Union's position is that Grynberg's layoffs were in violation of the contract's imperative to effect layoff by inverse order of seniority within the department since Ruiz unquestionably has less seniority than Grynberg in the jewelry department. As remedy for the contract violation, the Union seeks reimbursement retroactively on Grynberg's behalf, at his regular rate of pay, for each day of wrongful layoff sufferred by him since May 30, 1979.

The Employer concedes that bargaining unit work, specifically "grinding" (which Grynberg can do) actually was performed by Ruiz during Grynberg's layoffs. However, the Employer asserts that the grinding work performed by Ruiz during those layoff periods existed for no more than one to two hours per day, Ruiz's work efforts for the rest of the day were directed at necessary non-bargaining unit work. The Employer contends that it is not required under the contract to recall from layoff a senior worker for one to two hours per day.

The testimony submitted by both Union and Employer witnesses clearly identify Ruiz as a handy, odd job type of invidual whose talents were called upon to perform a number of varied tasks such as fixing machinery, vacuum cleaners, performing light plumbing and electrical repairs, cleaning the shop and its windows, doing general

maintenance work, running errands, collecting lemel (fine filings of gold Dust) and stamping, etc. He was utilized by the Employer in these activities irrespective of his classification as grinder.

The seniority clause of the contract provides, as in most collective bargaining agreements, for a measure of job security for the employee with greater seniority. The patent purpose of this arrangement is to keep as many senior employees as is needed during slack production periods at their regular work.

The facts of this matter do not fit squarely with the commonly accepted concept of layoff by seniority. While Grynberg has greater seniority than Ruiz, he does not have the latter's variety of handyman skills, or, if he does, he never performed those non-bargaining unit tasks. More to the point, The Employer needed Ruiz to do all the things others could not, or possibly, would not do -- work not contemplated by the contact.

It seems to me that excessive zeal in applying seniority to the facts of this matter exposes the Employer to an unwarranted burden of choices: pay double wages for each work day, wages for the bulk of the days work done by Ruiz and wages for the grinding work of not more than two hours done by Grynberg; or, the Employer might do without Ruiz and keep Grynberg on for thie grinding only; or, the Employer might do without either Ruiz or Grynberg. Whatever course the Employer pursues, it is plain that its economic interests adversely would be affected.

In my opinion, the use of seniority effecting these kinds of results, on one hand, overprotects the senior employee (Grynberg would have only two hours of work daily at most) and, on the other hand, serves to deprive the Employer of his legitiamte right to tend to its non-bargaining unit work needs. The use of seniority in this way is tantamount to abuse of the seniority provisions of the contract.

The grievance is denied.

For this reasons hereinabove set forth and upon all of the creditable and substantial evidence and testimony of the case as a whole, I make the following:

AWARD

The Employer did not layoff David Grynberg out of seniority in violation of the contract.

Dated: November 9, 1985.

S/Mario A. Procopio
Mario A. Procopio, Arbitrator

AFFIRMATION

STATE OF NEW YORK)
) SS.:
COUNTY OF NASSAU)

On this 9th day of November, 1985, I hereby affirm, pursuant to Section 7507 of the Civil Practice Law and Rules, that the foregoing is my Award in the above captioned matter.

S/Mario A. Procopio

APPENDIX 8 - FROM APPELLANT'S REPLY BRIEF IN COURT OF APPEALS: CORRESPONDENCE OF UNION INTERVENTION IN CASE AT APPELLATE LEVEL.

a) Letter of Union Counsel to Court of Appeals Judges

Letter from:(Sturm & Perl-Counsellors At Law, 21 East 40th Street, New York, N.Y. 10016)

Dated: October 30, 1986

United States Court of Appeals
for the Second Circuit
U. S. Courthouse
40 Foley Square
New York, New York 10007

Re: In the Matter of the Arbitration between Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union, SEIU, AFL-CIO, by David Grynberg, Grievant, as delegated proponent of the Grievance, Petitioner-Appellant-and-Skalet, Inc., Respondent-Appellee Employer
District Court Docket No. 86 Civ. 427 (CBN)

Dear Judges of the United States Court of Appeals for the Second Circuit:

We are General Counsel to Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union, SEIU, AFL-CIO (hereinafter referred to as the "Union"). We are in receipt of a Civil Appeal Pre-Argument Statement dated October 22, 1986 submitted by Milton Horowitz, Esq., attorney for the Petitioner-Appellant in the above captioned matter. Mr. Horowitz, on page 2 in his *Brief Description of Nature of Action and Result Below* states:

> "Although both Union and Employer were served as prescribed in 9 U.S.C. §12, only the Employer appeared and opposed. The Union did not appear in this suit."

We indicated in our letter to Mr. Horowitz, dated March 10, 1986, a copy of which is attached herewith, and we reiterate herein that the Union could not and had not been served by the Petitioner-Appellant as he seems to imply in the above statement and thereby could not and did "appear in this suit." Title 9 of the United States Code, §12, states in part:

> "Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within 3 months after the award is filed or delivered."

The Union in this case is not only *not* an adverse party since Petitioner-Appellant clearly indicates in the caption of his case that the adverse party is Skalet, Inc., the Respondent-Appellee, but in fact is not a party at all. Further, Mr. Horowitz's papers submitted to Judge Motley never claimed the Union to be a party in this matter and therefore the Union was not constrained to appear notwithstanding never served. Now, however, since Mr. Horowitz attempts to drag the union into this, it is constrained to respond accordingly.

If, in fact, Mr. Horowitz in his confusing complaint wished to claim that the Union failed in its duty to Mr. Grynberg of fair representation, then Mr. Horowitz had an obligation to timely sue the Union pursuant to Section 301 of the Labor Management Relations Act and serve the Union pursuant to Rule 4(d) of the Rules of Civil Procedure. We assure the Court that no such service was made upon the Union, nor, as Judge Motley found, has any such suit been instituted.

Therefore, we take severe exception to Mr. Horowitz's statement that the Union has been served pursuant to 9 U.S.C. §12 implying that it is a party required to have appeared before the District Court and request that this Court direct Mr. Horowitz accordingly.

Most respectfully,

STURM AND PERL

ByS/Roger H. Madon
Roger H. Madon

RHM/ss
cc: Milton A. Horowitz, Esq.
12 Park Row
New York, N.Y. 10038
Attorney for Petitioner-Appellant

Robert L. Rotmil, Esq.
Glauberman & Kessler
475 Fifth Avenue
New York, N.Y. 10017
Attorneys for Respondent-Appellee

Local 1-J, SEIU, AFL-CIO
133 West 44th Street
New York, N.Y. 10036
Non Party

APPENDIX 8

a) Correction letter of Union Counsel, October 31, 1986

Law office of(Sturm and Perl-Counsellors at Law, 21 East 40th Street, New York, N.Y. 10016)

Dated: October 31, 1986

United States Court of Appeals
for the Second Circuit
U.S. Courthouse
40 Foley Square
New York, N.Y. 10007

Re: In the Matter of the Arbitration between Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union, SEIU, AFL-CIO, by David Grynberg, Grievant, as delegated proponent of the Grievance, Petitioner-Appellant-and-Skalet, Inc., Respondent-Appellee Employer
District Court Docket No. 86 Civ. 427 (CBN)

Dear Judges of the United States Court of Appeals for the Second Circuit:

We wish to correct the fourth sentence found on page 1 of our letter to you dated October 30, 1986 in behalf of Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union, SEIU, AFL-CIO in reference to the above matter. The corrected sentence should read as follows:

> "We indicated in our letter to Mr. Horowitz, dated March 10, 1986, a copy of which is attached herewith, and we reiterate herein that the Union could not and had not been served by the Petitioner-Appellant as he

seems to imply in the above statement and thereby could not and did *not* 'appear in this suit.'"

Very truly yours,

STURM AND PERL

By S/Roger H. Madon
Roger H. Madon

RHM ss

cc: Milton A. Horowitz, Esq. (cc also to counsel for Appellee)
12 Park Row, New York, N.Y. 10038
Attorney for Petitioner-Appellant

APPENDIX 8

b) Reply letter of Milton Horowitz, October 31, 1986

Law office of:(Milton Horowitz, 15 Park Row, New York, N.Y. 10038)

Dated: October 31st, 1986

United States Court of Appeals
for the Second Circuit
U.S. Courthouse
Foley Square
New York, N.Y. 10007

U.S. Ct. of Appeals Docket No. 86-7869

Re: In the Matter of the Arbitration between Local 1-J, Amalgamated Jewelry, Diamond & Watchcase Workers Union, S.E.I.U., AFL-CIO, by David Grynberg, Grievant, as delegated Proponent of the Grievance, Petitioner-Appellant-and-Skalet, Inc. Employer, Respondent-Appellee
Southern District File No. 86 Civ. 427 (CBM)

To the Honorable Judges of the above named Court of Appeals:

Cast in the same format in which the letter to this Court, dated October 30, 1986, of Sturm & Perl, Esqs., attorneys for the above named Union was made regarding this appeal, this letter is intended as a documented reply thereto. A duplicate copy will be handed up to Mr. Scardilli at a pre-argument conference on schedule for Wednesday, November 5, 1986 at 11:30 A.M. I am the attorney for the appellant, David Grynberg.

The main burden of the Union counsel's letter is a charge of inaccuracy in my pre-argument statement herein where I state:

"Although both Union and Employer were served as prescribed in 9 U.S.C. §12, only the Employer appeared and opposed. The Union did not appear in this suit."

Beyond question the Union, as initiator of the arbitration proceeding on behalf of grievant Grynberg, was a party to the arbitration proceeding and, notwithstanding it begged out of Grynberg's representation at the very outset and before the first evidentiary hearing in the arbitration, it was the Union's status as party which, according to the Court below, barred Grynberg from having standing to maintain the suit - this notwithstanding the transcending mandate of section 301 of the Labor Management Relations Act giving the covered employee status in his own right to seek vacatur of an adverse award where his union has violated its statutory duty to afford him fair representation and, vacatur succeeding, thereafter to sue his employer for breach of the collective agreement free of its arbitration strictures.

Especially in the light of the Union's firm refusal to join in or give consent to Grynberg's judicial application for vacatur of an arbitration award which denied grievant any relief whatsoever, the Union was, conditionally at least, a potentially adverse party entitled to be served with notice of the judicial proceeding.

Here the Union quotes only the first sentence of 9 U.S.C. §12 and thus eliminates a very meaningful second sentence. We quote both sentences:

"**§12.** Notice of motions to vacate or modify; service; stay of proceedings

> Notice of a motion to vacate, modify, or correct an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered. If the adverse party is a resident of the district within which the award was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. * * * "

Annexed hereto is a photocopy of Docket item #2 consisting of three backed sheets in the District Court file, the Notice of Motion, dated January 13, 1986, to vacate the arbitration award herein of November 9, 1985, returnable February 7, 1986, and proof of service thereof, with the petition herein and exhibits, by mail on January 13, 1986, on Martin Ellenberg, Esq. the then attorney for the Employer herein and upon Sturm & Perl, Esqs., there characterized as "Attorneys for the Union Party to the Arbitration."

Having received timely service executed in a statutorily prescribed manner, the Union party to the arbitration had three options open to it, *viz.*, it could appear as an adverse party and become a named respondent; it could change its mind and appear in the suit as a proponent of the application for vacatur of the award with which it had professed disagreement; or, not being a target for any relief being sought by the grievant petitioner, it could stand away from the proceeding and not proceed at all. This latter was the alternative for which the Union, quite voluntarily, opted. But it cannot claim as it does now, that it could not appear because it was not "served."

But what this "representative" has here established, is its inexorable hostility to the grievant and his claim.

Respectfully submitted

S/Milton Horowitz
Milton Horowitz

P.S.:-Please note my correct name
and address.

MH es - Encs.

cc: Robert L. Rotmil, Esq.
Glauberman & Kessler, Esqs.
475 Fifth Avenue
New York, N.Y. 10017
(212) 725-5599
For Employer-Appellee

Rober H. Madon, Esq.
Sturm & Perl, Esqs.
21 East 40th Street
New York, N.Y. 10016
(212) 685-8487
For the Union

Frank J. Scardilli, Esq.
Staff Counsel

(Enclosures at J.A. 6a-8a)

APPENDIX 8 c) LETTER OF GRYNBERG'S COUNSEL TO COURT OF APPEALS OPERATIONS MANAGER, NOVEMBER 24, 1986

[Letterhead of Milton Horowitz, Esq., 15 Park Row, New York, NY 10038]

November 24, 1986

Marcia C. Mahan,
Operations Manager
U.S. Court of Appeals, 2d Circuit—Rm. 1702
40 Foley Square
New York, N.Y. 10007

Re: LOCAL 1-J V SKALET INC
Docket No. 867869

Dear Ms. Mahan:

Per our recent conversation, you will notice that beneath the three cover designations of Plaintiff, Plaintiff-Appellant, and Defendant-Appellee, I have set forth the following designations in parentheses: (Petitioner), (Petitioner-Appellant), (Respondent-Appellee)

The reason I have done so is to avoid confusion since in all the papers in the District Court, the format had been between a petitioner and a respondent.

I also enclose samples of District Court opinions with the published Petitioner-Respondent format, as well as a copy of 9 U.S.C. §6.

If the Court will not allow these alternate designations, please let me know and I will come to your office armed with a bottle of Wite Out.

Many thanks for your fine courtesies.

Sincerely,
s/ Milton Horowitz
Milton Horowitz
Attorney for Appellant

MH es
Encs.

cc:
Glauberman & Kessler, Esqs.
Attorneys for Appellee
475 Fifth Avenue
New York, N.Y. 10017

Sturm & Perl, Esqs.
Attorneys for Union
21 East 40th Street
New York, N.Y. 10016

APPENDIX 8 d) LETTER OF UNION COUNSEL TO COURT OF APPEALS OPERATIONS MANAGER, NOVEMBER 29, 1986

[Letterhead of Sturm and Perl, 21 East 40th Street, New York, NY 10016]

November 25, 1986

Ms. Marcia C. Mahan,
Operations Manager
U.S. Court of Appeals
Second Circuit—Room 1702
40 Foley Square
New York, N.Y. 10007

Re: In the Matter of the Arbitration between Local 1-J, Amalgamated Jewelry Diamond & Watchcase Workers Union, SEIU, AFL-CIO, by David Grynberg, Grievant, as delegatged proponent of the grievance, Petitioner-Appellant and Skalet, Inc., Respondent-Appellee Employer

Docket No. 86-7869

Dear Ms. Mahan:

We are in receipt of a letter dated November 24, 1986 from Milton Horowitz, attorney for the Petitioner-Appellant. We are also in receipt of the Petitioner-Appellant's Brief along with the Joint Exhibit. We note in the caption of both documents, Mr. Horowitz, who has a penchant for joining non-parties, now seems to have bifurcated his client, David Grynberg.

We have observed Mr. Horowitz's difficulty in his case, specifically his attempt to determine who exactly is the Petitioner and the Respondent, but that is no excuse for his inability to conform with the rules of practice before United States Court of Appeals.

Further, we have enclosed communications from this office to the judges of United States Court of Appeals for the Second Circuit dated October 30, 1986 and October 31, 1986 for your review.

Very truly yours,
STURM AND PERL
By s/ Roger H. Madon
Roger H. Madon
Attorney for Local 1-J, Amalgamated
Jewelry, Diamond & Watchcase
Workers Union, SEIU, AFL-CIO

RHM/ss
cc:
Milton A. Horowitz, Esq.
Robert L. Rotmil, Esq.
Local 1-J, SEIU, AFL-CIO
(Enclosures are Exhibit 1 to this Brief)

APPENDIX 8 e) LETTER OF GRYNBERG'S COUNSEL TO OPERATIONS MANAGER OF COURT OF APPEALS, DECEMBER 1, 1986

[Letterhead of Milton Horowitz, 15 Park Row, New York, NY 10038]

December 1st, 1986

Ms. Marcia C. Mahan,
Operations Manager
U.S. Court of Appeals
Second Circuit—Room 1702
40 Foley Square
New York, N.Y. 10007

Re: Docket No. 86-7869
In the Matter of the Arbitration between Local 1-J, Amalgamated etc. Jewelry Workers Union, S.E.I.U., AFL-CIO, by DAVID GRYNBERG, Grievant, as delegated proponent of the Grievance,
Plaintiff (Petitioner)
DAVID GRYNBERG, Grievant, as delegated Proponent of the Grievance, Plaintiff-Appellant (Petitioner-Appellant)
vs.
SKALET, INC., Employer, Defendant-Appellee (Respondent-Appellee)

Dear Ms. Mahan:

Reference the letter to you of November 25, 1986 of Sturm & Perl, Esqs., attorneys for Local 1-J, Amalgamated Jewelry, Diamond & Watchcase Workers Union, S.E.I.U., AFL-CIO, I would ordinarily not bother you with its inanities regarding the caption of the case.

However, for the third time now, via its enclosures of October 30, and 31, 1986, it repeats an old canard that the Union was not served with the instituting process of this case and therefore "could not appear" in the suit. Lest, through exhaustion, we omit a rebuttal in this third instance, we fear that the unrebutted last word may convey a lasting impression even though it is false in all respects. Hence we append our own rebuttal letter of October 31st, 1986 with its annexed copy of Item 2 of the docketed record herein, *viz.*, the Notice of Motion for Vacatur of the arbitration award and the affidavit proof of service of the Notice of Motion, Petition and Annexed Exhibits thereto, on both the attorneys for Employer and Union respectively, exactly as prescribed by 9 U.S.C. §12. See also Joint Appendix pp. 94a-97a.

This unrelieved Union sniping from the sidelines is yet further demonstration that this bargaining "representative"—required by law to fairly represent Grynberg—is actually at one with the Employer.

Sincerely,
s/ Milton Horowitz
Milton Horowitz

MH/es—Encs.
(cc: Counsel for Skalet and Union)

APPENDIX 8 f)—LETTER OF MARCIA C. MAHAN, DEPUTY CLERK, TO GRYNBERG'S ATTORNEY, DECEMBER 11, 1986

[Letterhead of U.S. Court of Appeals for the Second Circuit]

December 11, 1986

Milton Horowitz, Esq.
15 Park Row
New York, NY 10038
Re: Local 1-J v. Skalet, Inc.—Docket No. 86-7869

Dear Mr. Horowitz:

I am in receipt of your letter dated November 24, 1986, and a letter from Robert H. Madon, attorney for Local 1-J, concerning your apparent inability to comply with my instructions concerning the proper caption to be placed on all papers submitted to this office for filing.

As I indicated to you in two previous conversations, this office has provided you with an abbreviated caption for use on motions; and an official caption which is for use on briefs, appendices and ultimately the opinion issued by the court. Consequently, the briefs and appendices that you recently submitted are unacceptable and will not be filed in their present form. Therefore, please provide corrected covers no later than the close of business on Wednesday, December 16, 1986. I would strongly advise you to have them prepared by a commercial printer, as the judges of this court may not look favorably upon documents submitted to them for review that are covered with "white out." Accordingly, I have enclosed a copy of the official caption for your reference.

Very truly yours,

ELAINE B. GOLDSMITH,
Clerk
By: s/ Marcia C. Mahan
Marcia C. Mahan
Deputy Clerk

EBG:MCM:jrm
Enclosure

cc:
Roger H. Madon, Esq.
Sturm and Perl
21 East 40th Street
New York, New York 10016

APPENDIX 8 f) OFFICIAL CAPTION OF CASE IN COURT OF APPEALS, ANNEXED TO MAHAN LETTER.

CASE No. 86-7869
JUDGE BELOW Motley (0847)
SPECIAL CALENDAR NUMBER
CALENDAR NUMBER

TITLE OF CASE

Official Caption –

Docket No. 86-7869

In the Matter of the Arbitration between LOCAL 1-J, AMALGAMATED JEWELERY & WATCHCASE WORKERS UNION, S.E.I.U., by DAVID GRYNBERG, Grievant, as delegated Proponent of the Grievance,

Plaintiffs,

DAVID GRYNBERG, Grievant, as delegatged Proponent of the Grievance,

Plaintiff-Appellant,

v

SKALET, INC., Employer,

Defendant-Appellee.

Authorized Abbreviated Caption =

Docket No. 86-7869

LOCAL 1-J V SKALET INC

ATTORNEYS
APPELLANT:
MILTON HOROWITZ, ESQ., 15 Park Row, New York, N.Y. 10038, (212) 267-0606
APPELLEE:
GLAUBERMAN & KESSLER, ESQS., 475 Fifth Avenue, New York, N.Y. 10017, (212) 725-5599

Fed. R. App. P. 12(a) and 32(a).

'For use on correspondence and motions only.

No. 86-1930

Supreme Court, U.S.
FILED
JUL 17 1987
JOSEPH F. SPANIOL, JR.
CLERK

IN THE
Supreme Court of the United States
October Term, 1986

DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

Petitioner,

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., ALF-CIO,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT SKALET, INC.'S BRIEF IN OPPOSITION

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IN THE

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DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

Petitioner,

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., ALF-CIO,

Respondents.

RESPONDENT SKALET, INC.'S BRIEF IN OPPOSITION

Respondent SKALET, INC.[1] respectfully requests that this Court deny the Petition for Writ of Certiorari[2] seeking review of the Second Circuit Court of Appeals decision because there are no special or important considerations warranting review, as set forth in Rule 17 of the Rules of this Court.

---

[1]Skalet, Inc. is a privately held corporation with no parent company, subsidiary or affiliate.

[2]Petitioner, without any apparent authorization, changed the official caption by naming David Grynberg as an individual Petitioner and by converting the Union from a named Petitioner to a named Respondent.

STATEMENT OF THE CASE

SKALET, INC. ("Skalet") is a jewelry manufacturer and a member of the Jewelry Manufacturers Association, Inc. (the "Association"). The Association and its members are bound by a Collective Bargaining Agreement (the "Agreement") between the Association and the Amalgamated Jewelry, Diamond & Watchcase Workers' Union Local No. 1-J Service Employees International Union, AFL-CIO (the "Union"), which contains a grievance settlement procedure providing for arbitration (J.A. p. 65a).[3]

Petitioner, a Union member, was employed as a production jeweler since January 11, 1977 in Skalet's Jewelry Department. On March 12, 1984, the Union filed a demand for arbitration alleging that Petitioner was improperly laid off in contravention of the seniority provisions of the Agreement.

Prior to and during the course of preparing for the arbitration hearing, a dispute arose between Petitioner and the Union over how Petitioner's case before the Arbitrator should be handled and what witnesses should be called (A. pp. 14a-15a).

At the initial arbitration hearing on August 7, 1984, the Union and its counsel requested that the Arbitrator grant them permission to withdraw as Petitioner's representatives in the arbitration. Petitioner was given the opportunity by the Arbitrator to respond to the Union's request. After considering Petitioner's response and his letter to the Union dated August 3, 1984 (J.A. pp.

[3]For ease of reference, Petitioner's separate appendix annexed to his petition is referred to as "A", and the joint appendix submitted and referred to by Petitioner is referred to as "J.A."

the Arbitrator found that "the Union and its counsel do not have Mr. Grynberg's trust and faith adequately to represent him." The Arbitrator noted further:

> The Union and its counsel . . . are put to the task of performing their functions under the stressful cloud of Mr. Grynberg's expressed lack of confidence in them, a situation that invites repetition and escalation of Mr. Grynberg's complaint and subjects the Union and counsel to untenable compromise should they fail in their efforts to represent him (A. pp. 17a-18a).

The motion of the Union was granted. Petitioner was directed to obtain other legal representation. The Union and its counsel were relieved from active participation in the arbitration proceeding and were directed to supply data, documentation and administrative assistance to Petitioner and his attorney. Petitioner obtained other counsel and the Union and its counsel fully cooperated with Petitioner's counsel throughout the proceeding. Both the Union's counsel and Petitioner's counsel attended each of the three subsequent hearings held on January 23, 1985, March 15, 1985 and August 27, 1985.

The Arbitrator denied the grievance, finding that Petitioner had not been laid off in violation of the Collective Bargaining Agreement (J.A. pp. 23a-27a).

By letter dated November 29, 1985, Petitioner's counsel requested that the Union join in his application to set aside the Arbitrator's Award. The Union, while indicating that it disagreed with the Arbitrator's decision, declined to do so and instructed Petitioner that under no circumstances was he to indicate in his application that he represents the Union (J.A. pp. 54a-55a).

Petitioner commenced this proceeding pursuant to 9 U.S.C. Section 10(d) in the Union's name seeking to

vacate the Arbitrator's Award, alleging that the Arbitrator exceeded his powers in the award made on August 20, 1984 which allowed the Union and its counsel to withdraw, and in the award of November 9, 1985 which denied the grievance (J.A., pp. 6a-61a). During the course of the proceeding, Petitioner shifted his emphasis from simple vacatur of the Arbitration Award to a direct action against Respondent Skalet pursuant to §301 of the Labor Management Relations Act ("LMRA").

Petitioner has not filed an unfair labor practice complaint against the Union, nor has he instituted suit against the Union for any claimed breach of its duty of fair representation.[4]

ARGUMENT

REASONS FOR DENYING THE PETITION FOR A WRIT OF CERTIORARI

I. THE COURT'S PRIOR DECISION IN *HINES V. ANCHOR MOTOR FREIGHT, INC.* IS CONTROLLING

Petitioner attempts to portray this case as one of monumental importance to millions of workers and of great precedential significance. In fact, the case is unique in its facts, and is of minor precedential significance if any, since it was not reported in an official reporter except for a sub modo notation of affirmance by the Circuit Court, and correctly applies this Court's holding in *Hines vs. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976).

[4]Respondent Skalet, Inc. will not address Petitioner's charges relating to the Union's conduct subsequent to the District Court's decision except to note that said conduct could not have affected the Arbitrator's decision and to confess incredulity as to how Petitioner could covert the Union from the "named petitioner" at the District Court level to a "named respondent" before this Court.

The essence of Petitioner's claim is that the withdrawal by the Union and its counsel from directly representing Petitioner at the arbitration hearing constituted a breach of the Union's duty of fair representation which ipso facto tainted the Arbitrator's award, allowing him to avoid the finality of the arbitrator's decision by maintaining a §301 suit against the employer.

In *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), this Court held that the finality of an arbitrator's award prevents an employee from maintaining a §301 suit against his employer, unless the employee can show that his Union breached its duty of fair representation and that there is substantial reason to believe that such breach contributed to an erroneous arbitration award. The Court stated:

> The union's breach of duty relieves the employee of an express or implied requirement that disputes be settled through contractual grievance procedures; if it seriously undermines the integrity of the arbitral process the union's breach also removes the bar of the finality provisions of the Contract. . . . It is also true that where the union actually utilizes the grievance and arbitration procedures on behalf of the employee, the focus is no longer on the reasons for the union's failure to act, but on whether contrary to the arbitrator's decision, the employer breached the Contract and whether there is substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings. *Id.* at 567, 568.

Apart from the fact that the District and Circuit Courts both held that the Union's conduct did not constitute a breach of its duty of fair representation (A., pp. 11a and 2a), Petitioner made no effort to plead or demonstrate that the Union's conduct contributed to the alleged erroneous outcome of the arbitration proceeding.

Petitioenr claimed that the Union's conduct constituted an intrinsic infirmity in the arbitral process entitling him to proceed against the employer under §301, without the necessity of showing a tainting of the arbitrator's award (Petitioner's brief p. 19).

The District Court, applying *Hines, supra,* held that even if the Union did breach its duty, the Petitioner failed to either plead or establish in his papers that there is substantial reason to believe that the Union's breach of duty contributed to the allegedly erroneous outcome of the arbitration proceeding. Neither the Circuit Court or the District Court addressed the question of whether the Arbitrator exceeded his powers in interpreting the seniority provision of the Agreement so as to permit Respondent, who had no more than two (2) hours work per day in Petitioner's job classification, to retain a junior employee to perform work outside Petitioner's job classification, as that issue was not before the Court on Respondent's motion to dismiss.

Petitioner misinterprets the import of the rulings of the District Court and Circuit Court, and thus interposes questions to this Court not reached by the lower Courts. The District Court and Circuit Court merely held that based upon the unique circumstances of this case, the Union did not breach its duty of fair representation. They did not, as Petitioner suggests, hold that a Union is immune from liability for withdrawing without just cause from representation of an employee (Petitioner's brief P. 9). Such an interpretation is particularly unwarranted in light of Petitioner's unexplained failure to attempt to hold the Union accountable for its actions by instituting an action or unfair labor practice complaint against it (A. p. 12a).

Nor is this area of the law in further need of this Court's authoritative voice. In *Del Casal v. Eastern Airlines Inc.*, 634 F.2d 295 (5th Cir. 1981) cert. den. 454 U.S. 892 (1981), a union requested a hearing on behalf of a non-union employee before the Pilots Systems Board of Adjustment and thereafter refused to allow its attorney to represent the employee. The employee retained his own counsel who represented him throughout the hearings. The employee, inter alia,[1] alleged that the arbitral proceeding was seriously undermined by the Union's failure to represent him. The District Court held that the Union breached its duty of fair representation by withholding representation on the basis of union membership, but nevertheless dismissed the action against the innocent employer. Applying the *Hines* doctrine, the Fifth Circuit Court affirmed, holding that the Union's breach of its fiduciary duty did not seriously undermine the integrity of the arbitration proceeding, and that the employee's assertions to the contrary were invalid conjecture.

Similarly, in *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6th Cir. 1986) cert. den. 6/22/87 (Docket No. 86-1759), Union employees were represented by independent counsel throughout arbitral proceedings and thereafter brought a §301 action against the Employer and the Union. The Employer unsuccessfully moved for summary judgment on the basis of the finality clause in the Collective Bargaining Agreement. The case proceeded to trial, at which an expert witness testified that an arbitrator might be influenced by signals given out by a

---

[1]The employee also unsuccessfully attempted to vacate the arbitration proceeding based upon Railway Labor Act §153(9), which authorized an *employee* to petition to the District Court to review an award.

Union indicating that the Union did not want to win the case. The jury returned a verdict against the Union and Employer, which the District Court upheld despite the Employer's motion for judgment notwithstanding the verdict. In reversing the District Court's denial of the employer's motion for judgment as a matter of law, the Sixth Circuit Court, citing *Hines*, held that:

> [T]here was no evidence from which the jury could find that there was a substantial reason to believe that a union breach of duty contributed to the erroneous outcome of the contractual proceedings assuming that the outcome was erroneous. . . . Plaintiff's independent attorneys insured that plaintiff's interests were fairly represented. Any breach by the Union of its duty of fair representation therefore could not have tainted the decision of the arbitrator. . . . Expert testimony that some arbitrators may be influenced by Union signaling does not permit the speculation that this arbitration was so influenced where plaintiffs' own attorney fully presented their case. *Id.* at 501.

In the instant case, the Petitioner failed to plead or establish a substantial reason to believe that the Union's alleged breach of its duty contributed to the alleged erroneous outcome of the arbitration proceeding (A. p. 12a). The District Court and Circuit Court therefore correctly interpreted and applied this Court's holding in *Hines*.

II. THE ARBITRATOR ACTED WITHIN HIS POWERS BY RELIEVING THE UNION AND ITS COUNSEL OF ITS DUTY TO ACTIVELY PARTICIPATE IN THE ARBITRATION HEARING.

The manner in which an Arbitration Hearing proceeds is a procedural matter within the jurisdiction of the arbitrator.

> Once it is determined . . . that the parties are obligated to submit the subject matter of a dispute to arbitration, "procedural" questions which grow out of the dispute and bear on its final disposition should be left to the arbitrator. *John Wiley & Sons v. Livingston,* 376 U.S. 547, 557 (1964).

Necessarily, a wide range of discretion must be afforded to an arbitrator in resolving procedural issues which arise before him, or the system of arbitration would become ungovernable. The Arbitrator carefully considered the Petitioner's pre-hearing conduct, as well as the content of his letter of August 3, 1984. Petitioner's responses to questions propounded by the Arbitrator further confirmed that the Union and its counsel lacked Petitioner's trust and faith.

So long as the arbitrator acts within his powers it is not within the province of the Federal courts to question the Arbitrator's resolution of a procedural issue in the absence of clear and overwhelming evidence of prejudicial misconduct. Here, there was no evidence of any misconduct by the Arbitrator. To the contrary, Petitioner acknowledged the Arbitrator's good faith in his attorney's letter of January 14, 1985 (J.A., p. 34a). The Arbitrator here clearly acted within his powers by directing Petitioner to retain counsel to his liking and trust.

III. PETITIONER LACKS STANDING UNDER THE FEDERAL ARBITRATION ACT TO MOVE TO VACATE AN UNFAVORABLE ARBITRATION AWARD.

Petitioner initially petitioned the District Court to vacate the Arbitrator's Award pursuant to §10(d) of the Federal Arbitration Act (9 U.S.C. §10(d)) on the ground that the Arbitrator exceeded his powers. §10 authorizes a

District Court to vacate an Arbitration Award upon the application of any *party* to the arbitration. Non-parties to the Collective Bargaining Agreement pursuant to which an arbitration is brought lack standing to institute a proceeding under §10 to vacate the award. *Dundas Shipping & Trading Co. Ltd. v. Stravelakis Bros., Ltd.*, 508 F.Supp. 1000 (S.D.N.Y. 1981; *United States Postal Service v. American Postal Workers' Union*, 564 F.Supp. 545 (S.D.N.Y. 1982); *Lofton v. United States Postal Service*, 596 F. Supp. 36 (S.D.N.Y. 1984).

Since the Union and not the Petitioner, was a party to the Collective Bargaining Agreement, Petitioner lacks standing to institute a proceeding under §10 of the Federal Arbitration Act.

The Union's request to be relieved as Petitioner's representative and the Arbitrator's Award granting that request related only to the hearings then being conducted before the Arbitrator. There is nothing to indicate that the Union intended to be relieved, or, that the Arbitrator relieved the Union of any post-hearing obligations. The Arbitrator relieved the Union and counsel from active participationg in the hearings but nevertheless directed the Union and its counsel to provide the Petitioner with documentation and assistance (A. p. 18a). He did not substitute the Petitioner as a party to the proceeding, nor did he authorize the Petitioner to pursue any legal remedy. Nor could the Arbitrator have authorized Petitioner to move to confirm or vacate his award since Paragraphs 44.3 and 44.4 of the Collective Bargaining Agreement state:

> 44.3 It is agreed that this Contract shall not create or vest in any employee or group of employees, any rights or remedies which they or any of them can enforce either at

> law, equity or otherwise, as principal or third party beneficiary, it being understood and agreed by the parties hereto that all the rights and privileges created or implied under this Agreement shall be enforceable by the parties hereto and only in the manner established under this Agreement.
>
> 44.4 Except as otherwise provided by law, it is further agreed that no individual employee shall have the right to initiate any arbitration proceeding or any action at law or in equity, under this Agreement, it being the intent of the parties that the right to resolve any issue which may arise between the parties may be exercised only by the parties.

Nor was the Union indifferent to or supportive of Petitioner's motion to vacate the Arbitrator's Award. To the contrary, the Union's counsel informed Petitioner that the Union elected not to seek to set aside the Award and instructed Petitioner that he had no authority to pursue this claim as a representative of the Union (J.A. pp. 54a-55a). That letter clearly demonstrates that no irrevocable litigating commission was intended or granted to Petitioner. Petitioner therefore lacks standing to institute a proceeding under the Federal Arbitration Act. Furthermore, Petitioner's request for an arbitration de novo ignores the fact that the Collective Bargaining Agreement does not compel Respondent to arbitrate disputes with Petitioner in his individual capacity. Reversing the District Court's holding that an individual employee lacks standing to move pursuant to 9 USC §10 to vacate an unfavorable arbitration award would upset the expectations of all employers and unions in selecting arbitration as a means of resolving labor disputes and would lead this court down a slippery road of having to demarcate the actions a disgruntled employee may take in the union's name. For example, Article 6.1 of the Agreement authorizes the union to call a strike if the Employer fails to

comply with an arbitration award. Would Petitioner be authorized to call a strike of all employees if the Respondent failed to comply with the arbitrator's award? Clearly the facts of this case do not warrant this Court's consideration of those issues.

CONCLUSION

Petitioner lacks standing to move to vacate an unfavorable Arbitration Award under the Federal Arbitration Act. Petitioner failed to prove that the Union breached its duty of fair representation and that there was a substantial reason to believe that the Union's breach of duty contributed to the erroneous outcome of the arbitration proceeding, two necessary preconditions to maintain his §301 action. The District Court, as affirmed by the Second Circuit Court, correctly dismissed the Petition.

There is no conflict with any other Circuit Court, no important questions of Federal law to be settled by this Court, and no conflict with applicable decisions of this Court. The Petition for Writ of Certiorari should therefore be denied.

Respectfully submitted,

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EXCERPTS FROM COLLECTIVE BARGAINING AGREEMENT BETWEEN JEWELRY MANUFACTURERS ASSOC., INC. AND THE AMALGAMATED JEWELRY, DIAMOND & WATCHCSE WORKERS' UNION LOCAL No. 1-J SERVICE EMPLOYEES INTERNATIONAL UNION, AFL-CIO.

ARTICLE XLIV
ALTERATION AND RIGHTS UNDER AGREEMENT

44.1—No agreement, alteration, understanding, variation, waiver or modification of any of the terms or conditions or covenants contained herein shall be made by any employee or group of employees with the Employer or the Association, and in no case shall it be binding upon the parties hereto unless such agreement is made and executed in writing between the parties hereto.

44.2—The waiver of any breach or condition of this Agreement by any party shall not constitute a precedent in the future enforcement of all terms and conditions herein.

44.3—It is agreed that this contract shall not create or vest in any employee or group of employees, any rights or remedies which they or any of them can enforce either at law, equity or otherwise, as principal or third party beneficiary, it being understood and agreed by the parties hereto that all the rights and privileges created or implied under this Agreement shall be enforceable by the parties hereto and only in the manner established under this Agreement.

44.4—Except as otherwise provided by law, it is further agreed that no individual employee shall have the right to initiate any arbitration proceeding or any action at law or in equity, under this Agreement, it being the intent of the parties that the right to resolve any issue which may arise between the parties may be exercised only by the parties.

ARTICLE VI
NO STRIKES OR LOCK-OUTS

6.1—The Union will not call or sanction any strikes or stoppage of any kind whatsoever during the term of this Agreement, except for the Employer's failure to comply with any arbitration award rendered hereunder within five (5) working days after notice of such award.

6.2—The Employers will not cause any lock-outs during the term of this Agreement except for the Union's failure to comply with any arbitration award rendered within five (5) working days after notice of such award.

Supreme Court, U.S.
FILED
JUL 27 1987
JOSEPH F. SPANIOL, JR.
CLERK

No. 86-1930

IN THE
Supreme Court of the United States
October Term, 1986

DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

Petitioner,

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO,

Respondents.

PETITIONER'S REPLY BRIEF

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IN THE
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DAVID GRYNBERG, individually and as delegated Proponent of the Grievance in the Arbitration between LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO, and SKALET, INC., Employer,

Petitioner,

vs.

SKALET, INC. and LOCAL 1-J, AMALGAMATED JEWELRY, DIAMOND & WATCHCASE WORKERS UNION, S.E.I.U., AFL-CIO,

Respondents.

PETITIONER'S REPLY BRIEF

STATEMENT

Because respondent's opposition papers—a brief for the Employer respondent ("Skalet"), a letter from Local 1-J's counsel ("Union") of July 16, 1987—are so diffuse and generalized, we deem it necessary to maintain a context of reference in this reply brief with a short outline of the sequence of pertinent events and of what we feel to be the governing law in this case.

The Case for Which Review is Sought

Events

On March 12, 1984 the Union instituted an arbitration proceeding against Skalet on behalf of its shop steward ("Grynberg") seeking a make whole remedy of

back pay and incidental benefits because of Skalet's breach of the collective agreement in laying Grynberg off out of the contractually prescribed order of layoff in the inverse order of departmental seniority (Petition, pages 11, 12;* Joint Appendix, page 22a).** In pre-hearing discussion Union counsel told Grynberg that if he attempted to testify about the employer breach and its circumstances, counsel would terminate the Union's representation of Grynberg and, further, that the Union had no intention of calling corroborating witnesses (Pet. 14a). To Grynberg's written protest of August 3, 1984 and his demand that the Union not abandon him (Pet. 14a, 15a), the Union moved to be "removed" as Grynberg's representative on the ground of Grynberg's lack of "trust and faith" in it (Pet. 17a). Notwithstanding the Union's rhetorical ploy that if the arbitrator denied its motion, the Union was still prepared to go forward in the representation of Grynberg, and with Grynberg's letter of August 3, 1984 before him, the arbitrator nevertheless "removed" the Union and its counsel as Grynberg's representative and directed him to obtain other legal representation (Pet. 18a). Grynberg's new counsel, again before any evidentiary hearing, wrote to the arbitrator protesting the illegality of withdrawing Union representation both as a violation of Grynberg's entitlement to it and as a Union punishment for daring to express his desire to have witnesses, himself included, testify in his behalf. Grynberg's counsel also demanded that, in the light of what had happened, the arbitrator ought to step down so that the federal district court could appoint an impartial successor arbtrator (J.A. 33a). The arbitrator would not relinquish his position.

---

*References are to pages of the petition for certiorari herein; hereafter "Pet.__."

**References are to pages of the Joint Appendix for the Court of Appeals, a copy of which, for the convenience of this Court, was submitted with the petition herein; hereafter "J.A.__").

Bearing in mind that suppression of evidence—Grynberg's expressed desire for witness testimony to establish his case—was plainly the Union's purpose in its gambit to have the arbitrator* "remove" Grynberg's union representation, it is ironic that he succeeded in obtaining the affidavit and corroborating oral testimony of a gemstone setter no longer in Skalet's employ (Pet. 20a-22a) who testified that Grynberg's departmental junior, who was *always* retained while shop steward Grynberg was on layoff, was mainly engaged in performing the journeyman work of the jewelry department and did most of his sideline work, such as machine maintenance, out of regular hours when the machines were not in operation. He also testified to great personal animus for his shop steward on the part of Skalet's principal. The arbitrator in his final award of November 9, 1985 (Pet. 23a-27a), denying Grynberg any relief, not only disregarded the testimony of Grynberg's witness, he made sure it would appear undisputed and uncontested that, in Grynberg's absences, his departmental junior performed union journeyman work for only one or two hours a day and spent the rest of his time sweeping the floor, repairing vacuum cleaners and plumbing, maintaining machines and running errands. In the arbitrator's award, Grynberg's witness had no existence.

More important, in explicitly overriding the plain, unambiguous and unconditional contractual provision that seniority in department govern the order of layoff and recall (Pet. 11, 12), the arbitrator was not only indulging

---

*Suppression of evidence is a vacatable ground under the Federal Arbitration Act, 9 U.S.C. §10(c), and an arbitrator's participation is misconduct:

> "§10 *** the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
>
> ***
>
> (c) Where the arbitrators were guilty of misconduct *** in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced."

an error of law in circumventing the parol evidence rule, he was committing the vacatable arbitral error of dispensing his own nostrum at the expense of the fidelity which he owed to the contract. *United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960).

Because the Union professed to be unhappy with the award, Grynberg's counsel wrote to Union counsel requesting union cooperation and consent in the application which Grynberg was about to bring under 9 U.S.C. §10 to vacate the award and for a new arbitration (J.A. 52a, 53a), but Union counsel "reluctantly" declined to join in the application and delivered a closing stricture:

> "One further note, you are to advise Mr. Grynberg that under no circumstances is he to indicate in your application that he represents the Union for any reason or upon any basis, in law or equity." (J.A. 54a, 55a)

In the District Court proceeding to vacate the award and grant Grynberg a hearing *de novo* after vacatur, fully discussed in the petition, we feel there are three features of its opinion that would, for practical purposes, destroy judicial enforceability both of the §301(a) LMRA right to fair representation in grievance arbitration instituted by a union, whether or not augmented by the Federal Arbitration Act, 9 U.S.C. §§1, *et seq.*, and the sequential right of the wronged grievant, as individual, to judicial suit against the employer for breach of contract. These are:

1) The absurd notion that unless a grievant can convincingly fake unbounded faith and confidence in his union representative, he forfeits his right to its fair representation services. Our criticism is not directed to an objective showing of obstructiveness, but it surely has no place where the threat and use of withdrawal of union representation is a coercive attempt to suppress evidence and a punishment for the exercise of statutorily protected free speech.

2) The distorting impression sought to be created that

the "actual breach" of the union duty of fair representation and the "erroneous outcome" of the arbitration itself are two separate and discrete requirements for vacatur (Pet. 12a) when, as *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554, 568 (1976), makes clear, the "erroneous outcome" requirement is no different than the reversibility which flows from the commission of some material procedural flaw in ordinary litigation. An adverse award flowing from a threshhold withdrawal of representation in the interest of suppressing evidence and punishing protected speech, as well as from a perverse misreading of explicit contract language, is surely an "erroneous outcome."

3) The shocking denial of standing to a grievant—a real party in interest if ever there was one—as a "party" to an arbitration, to maintain suit for vacatur under the Federal Arbitration Act, especially where the grievant was forced to conduct the proceeding in his own behalf.

All of this the Court of Appeals has affirmed, *sub nom. Local 1-J v. Skalet,* 814 F.2d 653 (2 Cir. 1987).

The Law

We feel that the governing law is comprehensively set forth in the passage we quoted from *DelCostello v. United Brotherhood of Teamsters,* 462 U.S. 151, 163-165 (1983) (Pet. 6,7). And we point out that, in the pursuit of his breach of contract claims against the employer, Grynberg has exhausted arbitration remedies, and that his Union's abrupt abandonment of him in clear violation of its statutory duty to give him fair representation has been swifter and more radical than the merely perfunctory representation which the courts condemn as legally inadequate. Given those circumstances, his clear option, notwithstanding his employer's wistful desire that he get lost in premature, arbitration destroying, and very unpromising litigation against the Union, is to continue, doggedly, in the prosecution of his contract claims against his

employer. To that end, his very necessary first step under §301(a) LMRA is to get the adverse arbitration award vacated. What follows success in such a litigating venture is not an employer forfeiture, but a right of Grynberg to litigate his contract claims in a court of law according to law, and, against that eventuality, his employer has no legitimate complaint.

ARGUMENT

a) Skalet's Opposition

Peculiarly like Grynberg, Skalet places its chief reliance on *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976), although *Hines* is the source of reserving private rights of contract recovery against employers for grievants wronged by their unions' violation of duty to afford them fair representation in the arbitration which is the required remedial mode of first resort.

Supporting its recruitment of *Hines* for Skalet's purposes, Skalet cites *Del Casal v. Eastern Airlines, Inc.*, 634 F. 2d 295 (5 Cir. 1981) and *Wood v. International Brotherhood of Teamsters*, 807 F.2d 493 (6 Cir. 1986), *cert. den.* 6/22/87, __ U.S. __ (Docket No. 86-1759) as authorities disculpating the employer notwithstanding the unions' respective violations of the duty to furnish fair representation. To that argument, urged as applicable to this case where the employer's breach of the contract is freely admitted but excused because the contract provision was "unjust," we can only say:

1. Both cases present complicated facts not even remotely resembling the more typical grievance arbitration here presented.

2. Neither case has been ruled upon for merits by this Court.

3. *Hines v. Anchor Motor Freight, Inc.* still requires a judicial inquiry into the pervasiveness and severity of procedural transgressions.

4. For purposes of certiorari, resolution of important issues by the Court, rather than a showing of the likelihood of ultimate victory by the petitioner is the guiding requisite.

We take sharp issue with Skalet's statement at page 4 of its brief:

> "Petitioner attempts to portray this case as one of monumental importance to millions of workers and of great precedential significance. In fact, the case is unique in its facts, and is of minor precedential significance if any, since it was not reported in an *official* reporter excerpt for a sub modo notation of affirmance by the Circuit Court, and correctly applies this Court's holding in *Hines v. Anchor Motor Freight, Inc.*, 424 U.S. 554 (1976)." (emphasis supplied)

If the *unofficial* reporter of the district court opinion is the American Arbitration Association, then the arbitrating industry knows how greatly its powers have been enhanced to satisfy its financial supporters, *viz.*, unions and employers, at the expense of hapless grievants.

The case is important if, to practical effect, it renders unenforceable what Congress intended as a strong remedial right to fair representation as the *quid pro quo* for the exclusive contract enforcing powers granted to the union representatives. Under this case, a grievant must convince his union representative of his "trust and faith" in it, acquiesce in and not even press his own ideas against or as proposed alternative to whatever the union proposes—even to a point of suppressing evidence; if he is abandoned and forced to conduct his own case, and even if the arbitrator commits transgressions forbidden by the Federal Arbitration Act—exceeds his powers by depriving the grievant of his statutory right to representation by his union and connives to do so because he knows the Union wants to suppress the testimony of witnesses who would help its case, acknowledges a breach of contract but refuses to enforce its terms, the arbitrator will yet succeed

because the grievant, although forced to conduct the arbitration as his own is nevertheless *judicially* denied standing as a party to maintain the vacatur proceeding.

There are, of course, millions of such people and their families plus the millions more who love equal justice for all classes of our citizenry. And the holding below reduces the American worker to the status of a peon without ordinary rights of judicial recourse.

b) The Union as both plaintiff and respondent

By letter, as usual, the Union complains that the low portion of the caption has been altered so that the Union, although a plaintiff on the top half of the Court of Appeals caption is now a respondent at the bottom of the certiorari caption. But, of course, for certiorari purposes, a plaintiff may be made a respondent and a defendant may be a petitioner.

In its frantic correspondence with the Court of Appeals, the Union sought to destroy Grynberg's entire case by claiming a fatal omission to obtain personal service of district court process on the Union.

Actually originating service had been made on both Skalet and the Union by mail under the provisions of 9 U.S.C. §12 allowing service on local attorneys for the parties and with mail sanctioned for such service under FRCP Rule 5(b). It was therefore properly served with originating process, but it chose to stay aloof.

Having intruded itself back into the case, we feel that the Union is entitled to make its applications on proper papers rather than letters. It may be that its intrusive efforts have made it susceptible to remedial attention by the Court.

CONCLUSION

For the foregoing reasons, as well as those expressed in our petition, petitioner earnestly prays for the grant of a writ of certiorari herein.

Dated: New York, New York
July 23, 1987

Respectfully submitted,

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